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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF CALIFORNIA,
Petitioner,

vs.

VINCENT HARVIER, as Chairman of the Quechan Tribal Council, *et al.*,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the tribal sovereign immunity doctrine bars an action by a state to restrain tribal officials from carrying out a tribal ordinance that is allegedly in violation of federal law, in circumstances where the tribal ordinance prohibits the state from applying its laws to non-Indians who hunt and fish on the reservation.

2. Whether an order dismissing a complaint is a final and appealable decision under 28 U.S.C. § 1291.

LIST OF THE PARTIES

The plaintiff and petitioner is the State of California. The defendants and respondents are Vincent Harvier, as Chairman of the Quechan Tribal Council; George Bryant, William Curran, Joseph Jackson, Anderson Miguel, Jr., and Rebecca Ramirez, as members of the Quechan Tribal Council; and Neil Hill, as Fish and Game Warden for the Quechan Tribe of Indians.

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OPINIONS BELOW

The decision of the U.S. Court of Appeals is set forth at Appendix 1-20, and the decision of the district court is set forth at Appendix 21-23. Neither decision has yet been officially reported.

JURISDICTIONAL GROUNDS

The decision of the U.S. Court of Appeals was filed on March 4, 1983, and no petition for rehearing was filed or is pending.

This Court has jurisdiction to review the lower judgment on writ of certiorari under 28 U.S.C. § 1254(1).

APPLICABLE FEDERAL LAWS

The tribal immunity issue raised herein is based on the common law, not on federal constitutional or statutory provisions.

The appealability issue raised herein is based on 28 U.S.C. § 1291, which provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Sureme Court."

STATEMENT OF THE CASE

In 1975, the Quechan Indian Tribe, which occupies the Fort Yuma Reservation in California, adopted a tribal ordinance providing for exclusive tribal jurisdiction over non-Indians who hunt and fish on the reservation. Under the ordinance, non-Indians can hunt and fish on the reservation if they have a permit issued by the Tribe, regardless of whether they have a permit issued by the State of California. In 1976, California filed an action for declaratory relief against the "Quechan Tribe of Indians," asking for a judgment that (1) California fish and game laws apply to non-Indians who hunt and fish on the reservation and (2) California fish and game officials have the right to enter the reservation to enforce California laws against

non-Indians on the reservation.[1] The district court held that California laws apply to non-Indians on the reservation, but that California officials cannot enter the reservation to enforce such laws. Both sides appealed.

The Court of Appeals, without reaching the merits, dismissed the action on grounds that the tribal immunity doctrine bars actions against Indian tribes. *People v. Quechan Tribe,* 595 F.2d 1153, 1154 (9th Cir. 1979). The appellate court ruled that the tribal immunity defense, although not raised at the trial level, could be raised for the first time on appeal. 595 F.2d at 1154.

In 1979, California brought another action—for declaratory judgment under 28 U.S.C. § 2201—to resolve the controversy. This time, following the familiar practice in sovereign immunity cases of suing the official rather that the sovereignty, California brought its action against the tribal officials acting on behalf of the Tribe. The complaint names one defendant "as Chairman of Quechan Tribal Council," five other defendants "as members of Quechan Tribal Council," and another defendant "as Fish and Game Warden for Quechan Tribe of Indians." Complaint, at 1. The complaint alleges that the "defendants are officers of the Quechan Tribe of Indians, and are sued in their capacity as such." Complaint, ¶ 4, at 2. The complaint seeks a decla-

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[1]California asserts concurrent, not exclusive, jurisdiction over non-Indians who hunt and fish on the reservation. In California's view, non-Indians must obtain a State permit even though they may also be required to obtain a tribal permit.

ration that the defendants, in carrying out the tribal ordinance, are violating federal law.[2]

The defendants filed a motion to dismiss the complaint on tribal immunity grounds. The district court granted the motion, reasoning that California cannot obtain relief against the tribal officials that cannot be obtained directly against the Tribe.[3] The court commented that the Supreme Court "has not established any clear directives" with respect to the tribal immunity doctrine and "has not enunciated any rule for determining those circumstances" in which the doctrine applies. App. 22. According to the court, lower federal courts have distinguished "between suits against tribal members in their individual capacities, which may be maintained, and suits against them in their representative capacities, which may not be maintained." App. 22. Since, according to the court, the present suit was "clearly brought against the defendants in their representative capacities," the action "is barred by the doctrine

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[2]According to the complaint, California laws apply to non-Indians on the reservation pursuant to "general principles of federal Indian law" and various statutory principles. Complaint ¶ 7, at 3. The reference to "general principles of federal Indian law" is a reference to the common law rule developed by this Court authorizing the application of state laws on Indian reservations except where such state laws are preempted by Congress or interfere with tribal self-government. See, *e.g.*, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962).

[3]In oral argument, the district court said that California was improperly "trying to come in through the back door" by suing tribal officials for relief which could not be obtained directly against the tribe. Tr. 11. In its dismissal order, the court said that "this suit varies from the previous one only in that defendants are not the tribe itself, but various members of the Tribal Council and the Fish and Game Warden of the Tribe." App. 21-22.

of sovereign immunity of Indian Tribes." App. 23. In May 1980, California appealed the dismissal order to the Court of Appeals.

The defendants filed a motion to dismiss the appeal on grounds that an order dismissing a complaint is not a final and appealable decision under 28 U.S.C. § 1291. As we explain later, most circuit courts of appeal take the view that an order dismissing a complaint is final and appealable. See text accompanying note 9, *infra*. The Ninth Circuit, however, takes the view that such an order is appealable only if it is "clear" that the court below found that "the action could not be saved by any amendment of the complaint which the plaintiff could reasonably be expected to make." App. 2. California, in replying to the motion to dismiss the appeal, argued that it could not have been reasonably expected to amend its complaint, because the district court had made clear that California could not obtain relief against tribal officials that could not be obtained directly against the Tribe. An appellate panel upheld California's position and denied the defendants' motion to dismiss the appeal. The merits of the tribal immunity issue were then briefed and argued.

On March 4, 1983, nearly three years after California filed its appeal, the Court of Appeals issued a divided opinion upholding the district court's decision. The majority opinion, written by Judge Reinhardt and joined by Judge Hauk sitting by designation, upheld the district court ruling that California cannot sue the tribal offcials in their "official" capacities, and can only sue them in their "individual" capacities. App. 3-4. California, it was stated,

is free to amend its complaint to allege that the tribal officials "had exceeded the scope of their authority or were otherwise subject to suit in their individual capacities." *Id.* The majority opinion concluded that the district court's dismissal order was not appealable because California could have been "reasonably expected to amend" its complaint to sue the defendants in their "individual" capacities.[4] The majority opinion thus reversed, *sub silentio*, the earlier ruling of another appellate panel which had denied the defendants' motion to dismiss the appeal on grounds that California could *not* have been reasonably expected to amend its complaint. In effect, seven years after California filed its original action and four years after it filed its second action, the Court of Appeals once again failed to reach the merits of the controversy, again dismissing California's action on tribal immunity grounds.

The dissenting opinion, written by Judge Norris, correctly perceived that California sued the defendants in their "official" capacity because they were carrying out a tribal policy that was allegedly violative of federal law, and had *not* sued them in their "individual" capacity because they had not committed any unlawful acts beyond the scope of their authority under tribal law. According to the dissenting opinion, the State alleged that the defendants, "though not acting *ultra vires*," were "carrying out official

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[4]In fact, the district court had made clear, both in oral argument and its dismissal order, that California could not sue the tribal officials for relief which could not be obtained directly against the Tribe. See note 3, *supra*, and accompanying text. Under this view, such relief is unobtainable whether California sues the tribal officials in their "official" or "individual" capacities.

duties in violation of the Constitution."[5] App. 10 "It is this theory," the dissenting opinion states, which "the majority completely ignores and on which California rests its complaint." *Id.* The dissenting opinion commented that "to amend the complaint to sue the officers as individuals, as the majority opinion and district court demand, would change the gravamen of the state's entire claim." App. 14. Hence, the dissenting opinion concluded, the district court's dismissal order *was* appealable because California could not have been reasonably expected to amend its complaint.

To summarize, although the immediate issue decided by the court was the appealability of the dismissal order, this issue turned on whether California can sue the tribal officials in their official capacity to restrain them from carrying out an allegedly unlawful tribal policy. The majority judges and the district judge ruled that California can only sue the tribal officials in their "individual" capacity, not in their "official" or "representative" capacity. Although the majority opinion characterized this result as "narrow," App. 6, the practical effect is that tribal officials can only be restrained from committing "individual" acts beyond the scope of their authority under tribal law; they cannot be restrained from acting "officially" on behalf of the Tribe

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[5]Judge Norris correctly assumed that, if the tribal ordinance is invalid under federal statutory principles or under federal common law principles defining the applicability of state laws on Indian reservations, see note 2, supra, the tribal ordinance is ultimately invalid under the Supremacy Clause of the U.S. Constitution. Cf. *Florida Lime and Avacado Growers v. Paul,* 373 U.S. 132, 143 (1962) (preemption doctrine based on Supremacy Clause); *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1 (1824) (negative aspect of Commerce Clause based on Supremacy Clause).

in carrying out an allegedly unlawful tribal policy. The dissenting opinion correctly understood that, if California cannot sue the defendants in their "official" capacity, it cannot prevent them from carrying out an unlawful tribal policy; to require California to sue them in their "individual" capacity would "change the gravamen" of the State's claim. App. 14. Indeed, California has no complaint against the defendants for "individual" acts in excess of their authority under tribal law; its only complaint is that the defendants, acting as tribal representatives, are applying and enforcing an unlawful tribal policy. By preventing California from asserting the latter claim, the majority opinion effectively precludes litigants from challenging the validity of tribal laws and policies, and deprives California of the only claim that it has against the defendants.

ARGUMENT

INTRODUCTION

The primary issue raised in this petition involves the scope and effect of the tribal immunity doctrine. This issue raises an "important question of federal law which has not been, but should be, settled by this Court . . ." Rule 17(.1)(c), Rules of the Supreme Court. In line with Justice Blackmun's recent suggestion, the Court may wish to broadly determine whether the tribal immunity doctrine has continuing vitality under modern circumstances. See *Puyallup Tribe, Inc. v. Department of Game,* 433 U.S. 165, 178-179 (1977) (Blackmun, J., concurring). If the Court does not wish to go this far, it should at least clarify the rationale and application of the doctrine. As the district court below properly observed, the circumstances of the

doctrine's application are presently unclear. App. 22. This case presents an excellent opportunity to provide such clarification, for the majority opinion below effectively holds that the doctrine allows actions against tribal officials only when they exceed their authority under tribal law, but not when the tribal law itself is in violation of federal law.

The second issue raised in this petition is the appealability of an order dismissing a complaint. A conflict exists among the circuit courts of appeal with respect to this issue, which provides an additional basis for review of this case. Rule 17(.1)(a), Rules of the Supreme Court. Importantly, the appealability issue is inseparably linked with the tribal immunity issue, since the appealability of the dismissal order depends on the scope and effect of the tribal immunity doctrine. Hence, there is no danger that the Court may fail to reach the tribal immunity issue depending on its resolution of the appealability issue.

I

THE COURT SHOULD REVIEW THIS CASE TO CLARIFY THE RATIONALE AND APPLICATION OF THE TRIBAL IMMUNITY DOCTRINE, AND PERHAPS TO DETERMINE WHETHER THE DOCTRINE HAS CONTINUING VITALITY

A. The Tribal Immunity Doctrine Lacks Clarity In Rationale and Application

This Court has, in several cases, fully defined the scope of the sovereign immunity doctrine as applied to the federal government, and as applied to the states under the Eleventh Amendment of the U.S. Constitution. In *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949), the Court

held that the federal immunity doctrine bars actions against the federal government and its representatives, subject to two exceptions. First, an action can be brought against a federal officer in his "individual" capacity for acts that are *ultra vires* his statutory authority, *i.e.* where "the officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden." 337 U.S. at 689. Second, an action can be brought against a federal officer in his official capacity where "the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional." *Id.* at 690. See *e.g., Dugan v. Rank,* 372 U.S. 609, 621-622 (1963). Thus, the first exception authorizes action against federal officials in their "individual" capacity when they act *ultra vires* their statutory authority, and the second authorizes actions against them in their official capacity when they act pursuant to authority which is allegedly unconstitutional. The second exception is now so well recognized that it is rarely discussed in cases where it is applied. See, *e.g., Andrus, Secretary of the Interior v. Sierra Club,* 442 U.S. 347 (1979).

Under the Eleventh Amendment, the states are immune from actions brought in federal courts either by citizens of other states or by citizens of the defendant state. See, *e.g., Hans v. Louisiana,* 134 U.S. 1 (1890); *Parden v. Terminal Railway,* 377 U.S. 184, 186 (1964). In *Ex parte Young,* 209 U.S. 123 (1908), this Court held that the Eleventh Amendment only bars actions seeking retrospective relief against a state, not actions seeking prospective relief. See also *Edelman v. Jordan,* 415 U.S. 651 (1974).

In contrast, few cases define the rationale or effect of the tribal immunity doctrine. The doctrine was first expounded in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), where—in an action for monetary relief brought by an Indian tribe—this Court refused to allow a cross-complaint for monetary relief *against* the tribe. The Court, without analyzing the policy or wisdom of extending the sovereign immunity doctrine to Indian tribes, commented simply that "the immunity which was theirs [the tribe's] as sovereigns passed to the United States for their benefit, as their tribal properties did." 309 U.S. at 512. Since this decision predated the Court's decision in *Larson v. Domestic & Foreign Corp., supra,* which defined the two exceptions to the federal immunity doctrine, the Court in *Fidelity & Guaranty* did not indicate whether the same two exceptions applied to the tribal immunity doctrine.

In two recent cases, this Court has indicated that the tribal immunity doctrine may be subject to exceptions, although the exact nature of the exceptions was not spelled out. See *Puyallup Tribe v. Department of Game,* 433 U.S. 165, 172-173 (1977); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). In *Puyallup,* the Court held that the doctrine does not apply to individual tribal members who are not tribal officials, and are not purporting to act on behalf of the Tribe. 433 U.S. at 172. In *Martinez,* the Court held that the doctrine *does* apply to intra-tribal disputes, *i.e.,* where a tribal member sues tribal officials for carrying out

acts on behalf of the Tribe.[6] Neither case considered the broad question, raised here, whether the doctrine bars actions challenging the validity of tribal laws, at least where intra-tribal disputes are not involved. Hence, this issue is novel and important. It is likely to arise again in another case involving another Tribe in California.[7] The district court below was correct in observing that this Court "has not established any clear directives" concerning the tribal immunity doctrine, and "has not enunciated any rule for determining those circumstances" where it is applied. App. 14. The case thus merits the attention of this Court.

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[6]In *Martinez*, the Court held that the tribal immunity doctrine bars an action by tribal members against tribal officials in an intra-tribal dispute, where the action would impair the ability of the tribe to govern itself. 436 U.S. at 59-62. There, a tribal member sued tribal officials for carrying out a tribal ordinance that was allegedly unlawful under the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303. The Court, noting that the tribe had established a forum for the resolution of "intra-tribal disputes," 433 U.S. at 59-60, ruled that an abrogation of the tribal immunity doctrine would undermine the adjudicatory machinery established by the tribe for the resolution of intra-tribal disputes, and thus "infringe on the right of the Indians to govern themselves," *id.* at 59. The case is distinguishable here because the instant dispute is between the State and the Tribe, and is not an intra-tribal dispute. Further, the Tribe here, unlike the tribe in *Martinez*, has no judicial machinery for the resolution of the dispute. Moreover, even if such machinery existed, the sovereign State of California could not be expected to submit to a tribal forum for the resolution of this significant jurisdictional issue.

[7]The Covelo Indian Community, which occupies the Round Valley Indian Reservation in California, is considering the adoption of regulations that would expressly "preclude" State regulation of or jurisdiction over non-Indians who hunt and fish within the boundaries of the reservation. If the regulations are adopted, California will almost certainly bring an action challenging their validity on the same grounds that underlie the instant action.

B. The Lower Decision Effectively Bars Litigants From Challenging the Validity of Tribal Ordinances and Policies Under Federal Law

In this case, California brought its action against the tribal officials in their official rather than individual capacity for two reasons. First, the tribal officers were acting in their official capacity in enforcing a tribal ordinance that prevents California from applying its laws to non-Indians who hunt and fish on the reservation. Thus, California's grievance derives from the defendants' acts in their capacity as tribal officers, not from acts unrelated to their official conduct. Second, if California obtains a judgment against the tribal officials in their individual rather than official capacities, the Tribe could defeat the judgment simply by electing new officers. To ensure that the judgment runs against the office rather than the individual who momentarily occupies it, California brought its action against the tribal officers in their official capacities.

The majority opinion, in holding that California can sue the defendants in their "individual" but not "official" capacities, effectively allows California to sue the defendants only for acts *ultra vires* their authority under tribal law, and not for carrying out an allegedly unlawful tribal ordinance. In effect, the opinion bars judicial challenges to the validity of tribal policies under federal law. The opinion thus adopts the reasoning of the district court, which ruled that California cannot "come in through the back door" by seeking relief against tribal officials that cannot be obtained directly against the Tribe. See note 3, *supra*. Under this result, Indian tribes are apparently above the law in the sense that no remedy is available to

restrain them from pursuing an unlawful course of conduct. Neither the federal government nor the states have such an exalted status under the sovereign immunity doctrine. Thus, although the majority opinion purported to resolve only the "narrow" question of the proper styling of the complaint, App. 6, the decision effectively extends the tribal immunity doctrine beyond the bounds of the sovereign immunity doctrine as applied to the federal government and the states. The decision is narrow only in the sense that *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803) involved the narrow question whether William Marbury was entitled to retain his commission as a justice of the peace.

The lower court, in distinguishing between "official" and "individual" acts of tribal officers, relied on lower federal decisions holding that actions cannot be maintained against tribal officers for the recovery of tribal assets. App. 22. In *Bottomly v. Passamaquoddy Tribe et al.,* 599 F.2d 1061 (1st Cir. 1979), the First Circuit held than an attorney could not maintain an action against tribal officers in their "official" capacity for recovery of attorney fees, since the fees would be ultimately paid by the tribe. Assuming that *Bottomly* was correctly decided, it stands only for the proposition that tribal officials cannot be sued for monetary relief that would ultimately be paid by the tribe. The lower court, by extending the *Bottomly* rationale to this case, has effectively held that tribal officials are immune not only from suits for monetary relief, but also from suits to restrain them from engaging in an unlawful course of conduct. This Court, in federal and state sovereign immunity cases, has clearly distinguished between actions against

sovereign officials for monetary relief and actions to restrain them from engaging in an unlawful course of conduct. See, *e.g., Ex parte Young,* 209 U.S. 123 (1908). In other words, the proper distinction is between actions for prospective and retrospective relief, not actions against officers in their "official" and "individual" capacity. By applying the wrong distinction here, the lower court has defined and applied the tribal immunity doctrine differently than the sovereign immunity doctrine as applicable in other contexts.

The sweeping ramifications of the majority opinion are reflected in the breadth of the defendants' argument below, which was largely adopted in the majority opinion. The defendants argued that actions cannot be maintained against Indian tribes or officials in the absence of "a clear Congressional authorization for suit," and thus that the *Larson* exceptions do not fully apply in the tribal context. Brief of Appellees, 33.[8] The majority opinion, by holding

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[8]The defendants made the following assertions in their appellate brief:

(1) "The effects of any judicial determination [in this case] would certainly operate primarily against the Tribe as a whole instead of the named officers," and "this is not a case where an officer is withholding seized goods or is accused of tortious wrongdoing," Brief of Appellees at 25;

(2) "Traditional motions of individual federal officers' immunity cannot be applied wholesale to Indian tribes," *id.* at 26;

(3 "Since the combined functions of government are often carried out by a tribal Council, it is not always easy to determine whether tribal officers are acting in a legislative, judicial or executive capacity at any given time," and hence "there is considerable doubt whether the *Larson* line of cases . . . can be applied broadly to Indian tribal officials," *id.* at 30;

that tribal officers cannot be sued in their "official" capacity, largely adopted the defendants' argument. The dissenting judge fully understood the broad ramifications of the majority opinion, commenting that California "has complained of acts under color of an ordinance it alleges is unconstitutionally void" and "has not complained of any *ultra vires* act;" hence, to amend the complaint to sue the officers as individuals, as the majority and district court demand, would change the gravamen of the state's entire claim."

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(4) The "plaintiffs' basic assertion that this case can be 'resolved by preference to the general doctrine of sovereign immunity . . is not an accurate statement,' " *id.* at 31;

(5) Because of "the conceptual and legal difficulties of applying the *Larson* line of cases to Indian tribal officials," such suits cannot be maintained unless the plaintiffs "demonstrate a clear Congressional authorization for suit," *id.* at 33;

(6 Under the tribal immunity doctrine, "officials' actions are not invalid merely because they are based on an incorrect decision as to law or fact, 'if the officer making the decision was empowered to do so,' " *id.* at 34;

(7) The "plaintiffs' difficulty lies in the fact that the actions it complains of were within the officers' authority, and thus, under the *Larson* test, cannot furnish the basis for an individual suit," *id.* at 35;

(8) "Even applying its [*Larson's*] test to the Quechan officers' actions, it is clear that the actions are those of the Tribe rather than the individual officers," *id.* at 36;

(9) "If Quechan's officers had the authority to make the assertions, their actions are protected as those of the sovereign," *id.*;

(10) "Since the expression of the [legal] position is within the officer's authority, it cannot serve as the basis for an individual suit against the officers," *id.* at 39; and

(11) For all the above reasons, it is "more appropriate to settle these sorts of controversies in other forums, in recognition that the judiciary is frequently not the institution of government best suited to resolve such disputes," *id.* at 41.

App. 14. Indeed, we are not aware that the defendants have committed any unlawful "individual" acts beyond their authority under tribal law, and any such acts would be irrelevant to our complaint in any event.

The case is ripe for review now. The lower decision, although nominally allowing California to amend its complaint to sue the defendants in their "individual" capacity, effectively allows California only to sue the officers for exceeding their authority under tribal law, not for carrying out an unlawful tribal ordinance. The opinion thus allows California to assert a claim that it does *not* have, and bars California from asserting the claim that it *does* have. Unless the Court grants our petition, the case is over for all practical purposes.

C. Even Assuming Arguendo that the Lower Court Meant Only To Require That The Complaint Be Styled In A Particular Way, The Case Is Appropriate for Review By This Court

It might be argued that the majority opinion meant only to hold that California can challenge the validity of the tribal ordinance by suing the defendants in their "individual" capacity, and thus by simply changing the labels in its complaint. This interpretation is unlikely, since California cannot logically sue the tribal officers in their "individual" capacity for acts undertaken pursuant to their *official* authority under tribal law. The majority opinion obviously meant to affirm the district court conclusion, based on the *Bottomly* rationale, that California cannot obtain relief against tribal officials that cannot be obtained directly against the Tribe, see note 3, *supra*, a result consistent

with the defendants' argument that the *Larson* exceptions do not apply to Indian tribes and officials, see note 8, *supra*.

Assuming *arguendo* nonetheless that the majority opinion meant only to require a change in the labels of the complaint, we believe that this case merits this Court's attention for a different reason. If the liability of tribal officials depends on whether they are nominally sued in an "individual" or "official" capacity, then their liability depends on the form of the appellation rather than the substance of their conduct. This result simply elevates form over substance. If form thus prevails, then the rules governing the tribal immunity doctrine are vastly different from the substance-oriented rules generally applicable in the field of federal Indian law. See, *e.g., Washington v. Confederated Tribes*, 447 U.S. 134, 156 (1980) (applicability of state laws on Indian reservations depends on an "accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other"). If this anomaly exists, then this Court should plainly say so. Otherwise, future litigants may fall into the same semantical traps that, according to the majority opinion below, have waylaid California here. Because of the ambiguities surrounding the tribal immunity doctrine, California has failed to reach the merits of its action after two attempts spanning seven years. Surely the tribal immunity doctrine, whatever it means, must now be clarified so that these injustices of delay will not be incurred by other litigants in future cases.

Further, California cannot obtain adequate relief by suing the tribal officers in their "individual" capacity, as the majority opinion suggests that California should try

to do. If the defendants are sued in their "individual" rather than "official" capacity, any judgment in California's favor would run against the defendants in their private capacity, rather than against the office that they occupy. Under this result, the Tribe could easily defeat such a judgment by simply electing new officers. Hence, California lacks an adequate remedy against the defendants in their "individual" capacity, and the majority opinion was simply wrong in suggesting that such a remedy is available to California.

D. This Court May Wish To Re-examine The Validity Of The Tribal Immunity Doctrine

The Court may wish to determine the broader question whether the doctrine of tribal immunity retains vitality in light of recent decisions generally limiting sovereign immunity, and specifically limiting tribal sovereignty. At one time, this Court took the view that Indian reservations are distinct nations whose boundaries cannot be penetrated by the laws of the surrounding states. See *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 561 (1832). This early view, however, "has yielded to closer analysis," and state laws are now applicable on Indian reservations except where the state laws are preempted by Congress or interfere with tribal self-government. *Organized Village of Kake v. Egan,* 369 U.S. 60, 72, 75 (1962). See, *e.g., White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142 (1980); *Williams v. Lee,* 358 U.S. 217, 220 (1959). This Court has expressly narrowed the concept of tribal sovereignty, stating that "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption." *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 172 (1973). Independently, this Court has steadily narrowed the scope of the sovereign immunity doc-

trine as applied to the federal government and—through the Eleventh Amendment—to the states. See, *e.g., Larson v. Domestic & Foreign Corp.,* 337 U.S. 682 (1949) (federal sovereign immunity); *Ex parte Young,* 209 U.S. 123 (1908) (state sovereign immunity under Eleventh Amendment).

These developments raise a question whether the tribal immunity doctrine—which has never been spelled out with clarity by this Court—retains its vitality in the modern age, particularly with respect to matters involving regulation rather than tort, contract, or property. Justice Blackmun recently commented that he "entertains doubts . . . about the continuing vitality in this day of the doctrine of tribal immunity . . . ," and believes "that doctrine may well merit re-examination in an appropriate case." *Puyallup Tribe, Inc. v. Department of Game,* 433 U.S. 165, 178-179 (1977) (Blackmun, J., concurring). We believe that this may be an appropriate case.

The doubts about the continuing vitality of the tribal immunity doctrine are strengthened by the nature of its conceptual origin. In *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978), this Court said that the tribal immunity doctrine is a "common-law immunity from suit traditionally enjoyed by sovereign powers." Even the states, however, lack sovereign immunity under the common law. See *Chisholm v. Georgia,* 2 U.S. (2 Dall.) 419 (1793). The states' immunity was attained only by passage of a constitutional amendment. See, *e.g., Edelman v. Jordan,* 415 U.S. 651, 662-663 (1974). Since the states lack a common law immunity, and since Indian tribes stand on a lesser sovereign footing than the states under our constitutional system, it is questionable whether the Indian tribes can properly possess a common law immunity not enjoyed by the states.

II

THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEAL WITH RESPECT TO THE APPEALABILITY OF ORDERS DISMISSING COMPLAINTS

Under 28 U.S.C. § 1291, appeals can only be taken from "final decisions." The Second and Seventh Circuits take the view that an order dismissing a complaint is final and appealable under this section. See *Rineri v. News Syndicate Co.*, 385 F.2d 818, 821 (2d Cir. 1967); *Zadig v. Aetna Ins. Co.*, 42 F.2d 142, 143 (2d Cir. 1930); *Blair v. Cleveland Twist Drill Co.*, 197 F.2d 842 (7th Cir. 1942); Moore, *Federal Practice* (hereafter "Moore") ¶ 110.13(1) (2d ed. 1982).[9] The Ninth Circuit, however, takes the view that such an order is appealable only if it is "clear" that the court below found that "the action could not be saved by any amendment of the complaint which the plaintiff could reasonably be expected to make." App. 2; *Firchau v. Diamond Nat'l Corp.*, 345 F.2d 269 (9th Cir. 1965); *Marshall*

[9]According to Moore:

"An order that dismisses the entire action is clearly final and appealable [citations omitted], even if the dismissal is without prejudice. [Citation omitted.] A line of cases has developed, chiefly in the Ninth Circuit, that distinguishes between a judgment that dismisses the action and one that dismisses the complaint without expressly dismissing the action. It is said that the former is final, but that the latter is final only if it clearly appears that the district court determined that the action could not be saved by an amendment of the complaint.

"The distinction is conceptually sound, since an order that merely dismisses a complaint allows the plaintiff to amend, which he may do of right if no answer has been filed. [Citation omitted.] But it is practically difficult to apply because the court of appeals will often be obliged to guess at what was on the mind of the trial court. *On balance, it seems preferable to assume what is almost always the fact: a plaintiff who appeals has no desire to amend his complaint.*" *Moore* ¶110.3(1).

v. Sawyer, 301 F.2d 639, 643 (9th Cir. 1962). Thus, a conflict exists between the circuit courts of appeal with respect to the appealability of orders dismissing complaints, and this conflict provides another basis for review of this case.

With Professor Moore, we believe that the better view is that orders dismissing complaint are *per se* final and appealable, see note 9, *supra*, and that the finality rule "should be interpreted to prevent the loss of the right of an appeal, not to facilitate loss," *Moore*, ¶ 110.18(3). This view is particularly compelling as applied to the facts of this case. The appealability issue was raised in the defendants' motion to dismiss the appeal, and an appellate panel, in an earlier proceeding, denied the motion on grounds that the order was appealable. Certainly California was entitled to rely on the appellate panel's earlier ruling by continuing to prosecute its appeal, rather than filing an amended complaint in the district court. Therefore, a dismissal order should be deemed appealable once an appellate panel so rules and the case is then briefed and argued on its merits.[10]

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[10]This Court has said that the purpose of the finality rule is to prevent "piecemeal litigation" and avoid having cases "sent up in fragments." *Catlin v. United States*, 324 U.S. 229, 233-234 (1945). There is little danger that these results will occur here, because the majority opinion fully disposes of this case for all practical purposes. According to Moore, the finality rule has been interpreted with "great liberality" to prevent injustice. *Moore*, ¶ 110.18(1). Indeed, in *Forgay v. Conrad*, 47 U.S. (6 How.) 200, 203-206 (1848), this Court held that an order—otherwise "interlocutory"—was final and appealable where the losing party would suffer irreparable harm if appellate review had to await the final outcome of the litigation. Thus, equitable considerations are relevant in determining the appealability of dismissal orders. Since California reasonably relied on the appellate panel's earlier ruling upholding the appealability of the dismissal order, the order should be deemed appealable under 28 U.S.C. § 1291.

Importantly, the appealability issue cannot be resolved without reaching the tribal immunity issue. If California is correct in assuming that tribal officials can only be sued in their "official" capacity for carrying out an unlawful tribal policy, then California cannot possibly amend its complaint to restrain the tribal officials from carrying out the tribal ordinance in this case, and thus—even assuming the correctness of the Ninth Circuit rule—the dismissal order is final and appealable. The appealability issue is thus inseparably linked to the appealability issue. Assuming that the Court decides to review the case, there is no danger that it may rule on the appealability issue without reaching the tribal immunity issue.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court grant the petition for writ of certiorari.

Respectfully submitted,

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(Appendices follow)

APPENDIX A

State of California, Plantiff-Appellant,

vs.

Vincent Harvier, as Chairman of Quechan Tribal Council; George Bryant, William Curran, Joseph Jackson, Anderson Miguel, Jr., and Rebecca Ramirez, as members of Quechan Tribal Council; Neil Hill, as Fish and Game Warden for Quechan Tribe of Indians, et al., Defendants-Appellees.

No. 80-5323.

United States Court of Appeals, Ninth Circuit.
Argued and Submitted Nov. 2, 1981.

Decided March 4, 1983

Appeal from the United States District Court for the Southern District of California.

Before NORRIS and REINHARDT, Circuit Judges, and HAUK* District Judge

REINHARDT, Circuit Judge:

California brought this action under 28 U.S.C. § 2201 (Supp.IV 1980) for a declaratory judgment against the chairman and certain members of the Quechan Tribal Council, and the fish and game warden for the Quechan Tribe of Indians. The state sought a declaration that it was empowered, under "federal Indian law," to apply and enforce its fish and game laws against non-Indians hunting

*Honorable A. Andrew Hauk, Chief Judge, United States District Court for the Central District of California, sitting by designation.

and fishing on the Quechan reservation. California alleged that the tribal officials had threatened the state's game wardens and were denying them access to the reservation (Fort Yuma).

In a prior action, California sought the same declaratory relief against the Quechan tribe itself. We held that the doctrine of tribal immunity barred a suit against the tribe, although we strongly suggested in dictum that some type of legal action was still available to the state. *California v. Quechan Tribe,* 595 F.2d 1153, 1155 (9th Cir.1979). Following our decision California filed a suit against the tribal officials in their official capacities. The district court granted the defendants' motion to dismiss California's complaint, but did not expressly dismiss its action. We hold that we lack jurisdiction to hear the state's appeal from the district court's order.

On our own motion, we consider whether the order dismissing the complaint is an appealable order. Ordinarily, an order dismissing a complaint but not the underlying action is not a final order and is, therefore, not appealable under 28 U.S.C. § 1291 (1976). *Scanlon v. Atascadero State Hospital,* 677 F.2d 1271, 1272 (9th Cir.1982); *Sherman v. American Federation of Musicians,* 588 F.2d 1313, 1315 (10th Cir.1978); *Marshall v. Sawyer,* 301 F.2d 639, 643 (9th Cir.1962). We may regard such an order as final and appealable only if the record shows "special circumstances," *Firchau v. Diamond National Corp.,* 345 F.2d 269, 270-71 (9th Cir.1965); such that it is "clear" that the court below found that "the action could not be saved by any amendment of the complaint which the plaintiff could reasonably be expected to make. . . ." *Marshall,* 301 F.2d at 643 (citations omitted). *See generally* 9 J. Moore, *Moore's Federal*

Practice ¶ 110.13[1] (2d ed. 1982). Here it is far from clear that the district judge found that California's action could not be saved by any amendment of the complaint.

In its order granting defendants' motion to dismiss, the district court said:

> Lower court cases on point have drawn a distinction between suits against tribal members in their individual capacities, which may be maintained, and suits against them in their representative capacities, which may not be maintained. The present claim is clearly brought against the defendants in their representative capacities. . . . In fact, plaintiff's counsel admitted during argument that this suit is brought against the defendants in their capacity as members of the Tribal Council.

It is not at all clear from the district court's remarks that it found that the plaintiff's action could not be saved by any amendment of the complaint which California could reasonably be expected to make. Specifically, the court did not advise the parties how it would rule if the state amended its complaint to allege a cause of action under *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

In its order, the court relied on the distinction between suits against tribal members in their individual capacities, and suits against tribal officers acting within their representative capacities. It read the complaint as pleading only the latter type of suit and read *California v. Quechan Tribe*, 595 F.2d 1153 (9th Cir.1979) as barring such suits. The district judge did not rule, however, that tribal immunity precluded the state from amending its complaint to allege that the tribal officials had exceeded the scope of their

authority or were otherwise subject to suit in their individual capacities.

California complaint names the defendants "as members of Quechan Tribal Council" in its caption. In the body, the complaint states that "[d]efendants are officers of the Quechan Tribe of Indians and are sued in their capacity as such." In describing the nature of the alleged controversy, California states that defendants acted "in their capacity as officers of the Quechan Indian tribe." California did not name the defendants in their individual capacities or contend that the defendants were acting *ultra vires* or unconstitutionally. It did not allege that any unlawful conduct was taken by defendants in their individual capacities. Nor did it adequately make such an argument in its papers opposing defendants' motion to dismiss. To the contrary, by its complaint and in its argument on the motion to dismiss, the state focused the district court's attention on whether the tribal immunity rule is applicable to tribal officials acting in their official capacities, as well as to the tribe itself.

Defendants noted in their reply memorandum that plaintiff's complaint did not contain allegations necessary to invoke *Ex parte Young* but instead was based on the state's contention that tribal immunity does not bar suits against officials of Indian tribes. At oral argument defendants again stressed the *Ex parte Young* issue, and expressly acknowledged that under appropriate circumstances tribal officials may be stripped of their immunity and sued as individuals.

We have carefully studied the remarks of counsel and the district court at the hearing on the motion to dismiss.

Almost all the remarks of the participants in the dialogue are, when read in context, ambiguous to some extent. However, we note that early in the oral argument, counsel for the state emphasized the state's fundamental point, saying, "And to my knowledge the Supreme Court has never held that the sovereign immunity doctrine extends to tribal officials." Then, toward the end of the oral argument, counsel for the state advised the court, "Well, I would just say, briefly, your Honor, that it's correct, we are suing the tribal officials in this case in their capacity as tribal officers."

It is clear that counsel did not adequately raise or present the issue whether jurisdiction could properly have been pleaded by suing the tribal officers in their individual capacities on an *Ex parte Young* theory. It is not possible to determine with any certainty how the district judge would have ruled had a complaint been before him containing such allegations. The judge's order did not preclude appellant from filing an amended complaint of that nature, and we do not believe the ambiguous colloquy can fairly be construed as "clearly" demonstrating that the district court determined that no possible amendment could save the complaint. Thus we do not find the requisite "special circumstances" present here, and we decline to treat an order dismissing the complaint as a final order for purposes of 28 U.S.C. § 1291.

This case well illustrates the sound policy reasons underlying the final order rule we apply here. Our dissenting colleague urges us to decide important and complex issues of law regarding the sovereign immunity of Indian officials for actions taken pursuant to the valid constitution, bylaws and ordinances of the Indian nation. *See generally Califor-*

nia v. Quechan Tribe, 595 F.2d at 1154; *Quechan Tribe v. Rowe,* 531 F.2d 408, 408-10 (9th Cir. 1976). Yet the record before us is wholly inadequate for that purpose. In this respect, we need only note that the principal arguments and theories relied on in the dissenting opinion were never presented to or considered by the district court.

There can be no doubt that the final order rule is more than a mere formality. The rule embodies the substantive policy that legal issues should be developed initially before the district courts. The State's failure to amend its complaint when it reasonably could have been expected to do so deprived the district court of the opportunity to fully explore the sovereign immunity questions raised by the dissent. Our decision that we have no jurisdiction is simply a reaffirmation of the important substantive policy that we have long recognized. *See, e.g., Quechan Tribe v. Rowe,* 531 F.2d at 412 (Wallace, J., concurring) (where a legal question "has serious consequences and is an issue upon which there is a diversity of opinions . . . [t]he developmental process before the district court would provide us with a better foundation upon which to make our decision."); *Westinghouse Electric Corp. v. Weigel,* 426 F.2d 1356 (9th Cir.1970).

The dissenting opinion, although it sets forth a number of novel and interesting concepts, is largely irrelevant to the narrow question of law decided here. The entire thrust of our holding is that no final order has been issued by the district court. Although the specific complaint was dismissed, plaintiff's underlying cause of action remains before the lower court. *See supra,* slip op. at 962, at ..... Consequently, the State of California could have amended its

complaint to allege another potentially permissible basis for jurisdiction. Specifically, the State could have amended its complaint after the order of dismissal and placed the *Ex parte Young* question squarely before the district judge. Because California failed to do so, the order dismissing the complaint is not a final order and thus is not appealable. As a result, it is simply not necessary to reach the issues discussed in the dissent.[1]

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[1]Even though we need not resolve the issues raised in the dissent, it is important to note that none of the arguments relied on was ever presented to the district court by the State of California. Rather than proceeding on an *Ex parte Young* theory, California repeatedly emphasized that the defendants were being sued in their official capacities. *See supra* slip op. at 963, at . . . . In its brief to this court, the State candidly admits that

> [s]ince the effect of our action would restrain the Tribe from acting to prevent California fish and game officials from entering the reservation to enforce California laws against non-Indians, our action must . . . be considered as an action against the Tribe rather than against tribal members acting in their individual capacity.

In dismissing California's complaint, the district judge did not foreclose the possibility that the complaint could be amended to state a cause of action against the Indians in their individual capacities under an *Ex parte Young* theory. *See, e.g., United States v. State of Oregon,* 657 F.2d 1009, 1012 n. 8 (9th Cir. 1981); *Bottomly v. Passamaquoddy Tribe,* 599 F.2d 1061, 1062 (1st Cir. 1979). California failed to make such an amendment.

Moreover, the State of California never argued before the district court that any constitutional violations had been committed by the Indians acting in their official capacities. Even the State's brief on appeal implicitly disclaims any sort of constitutional argument. Rather, the State relied entirely on the theory that the Indians acting in their official capacities, had violated "general principles of federal Indian law." Although we do not resolve the issue here, we have serious doubt as to whether highly ambiguous allegations that "general federal law" has been violated are sufficient to strip the shield of sovereign immunity from Indian officers acting in their

The appeal is dismissed for lack of jurisdiction.

NORRIS, Circuit Judge, dissenting.

I

I respectfully dissent.

I understand the majority's position to be that the district judge's order dismissing the state's complaint is not appealable because it is not clear that "the action could

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official capacities. *See, e.g., Butz v. Economou,* 438 U.S. 478, 520, 98 S.Ct. 2894, 2917, 57 L.Ed.2d 895 (1978) (Rehnquist, J., concurring in part and dissenting in part); *Larson v. Domestic & Foreign Corp.,* 337 U.S. 682, 701, 69 S.Ct. 1457, 1467, 93 L.Ed. 1628 (1948). *See also* 14 Wright, Miller & Cooper, *Federal Practice & Procedure* § 3655 at 184 (1969) ("plaintiff specifically must allege the statutory limitation on which he or she relied . . .; conclusory allegations about 'illegal' or 'unauthorized' acts are not enough.").

Perhaps in response to the inherent weaknesses in California's complaint, the dissent argues that the provisions of 18 U.S.C. § 1162 and 28 U.S.C. § 1360 may also have been violated. *See infra* slip op. at 967, at . . . . While there is a brief mention of the two statutes in its complaint, the State of California never attempted to explain how the Indians violated those provisions. Indeed, the statutes were not even discussed by the State in its memorandum or during oral argument before the district court. Moreover, the two statutes are procedural in nature, and it is questionable whether they can be read as congressional withdrawals of the Indians' sovereign immunity in this sort of case. *See, e.g., Quechan Tribe of Indians v. Rowe,* 350 F.Supp. 106, 109 (S.D. Cal. 1972) and cases cited therein, *aff'd,* 531 F.2d 408 (9th Cir. 1976). Nevertheless, the dissent argues, without citing any authority, that the Supremacy Clause of the United States Constitution is violated when officers of an Indian tribe violate state law after the state has been authorized to apply its law by federal statute. This novel Supremacy Clause theory may or may not have merit, but it was never suggested by the State and was not considered by the district court. In view of California's failure to amend its complaint, we need not speculate how courts would rule on such a Supremacy Clause argument if one were ever properly raised.

not be saved by any amendment of the complaint which the plaintiff could reasonably be expected to make . . . ." *Marshall v. Sawyer,* 301 F.2d 639, 643 (9th Cir.1962). Particularly, the majority distinguishes between suits "against tribal members in their individual capacities, and suits against tribal officers acting within their representative capacities" and suggests that California should have amended its complaint to allege "that the tribal officials had exceeded the scope of their tribal authority or were otherwise subject to suit in their *individual* capacities." (Emphasis added). Had it done so, the majority suggests, it would have raised allegations sufficient to invoke the doctrine of *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), and thus given the district judge an opportunity to rule on whether tribal sovereign immunity barred the state's action against the tribal officials.

I agree that California did not allege that the tribal officers had exceeded the scope of their tribal authority. I agree, moreover, that had the state done so it would have invoked the doctrine of *Ex parte Young.* Yet, where the majority errs, and where I disagree, is in its suggestion that suing the tribal officials for acting *ultra vires* is the *only* way to invoke the doctrine of that case. There are two theories that invoke the doctrine of *Ex parte Young. See Washington v. Udall,* 417 F.2d 1310, 1314 (9th Cir.1969) One, certainly, is that government officials acted beyond the scope of their statutory authority. *United States v. Raines,* 362 U.S. 17, 25-26, 80 S.Ct. 519, 524-525, 4 L.Ed.2d 524 (1960); *Home Tel. & Tel. Co. v. City of Los Angeles,* 227 U.S. 278, 287-89, 33 S.Ct. 312, 314-315, 57 L.Ed. 510 (1913). This theory the majority recognizes. The other theory consists of an allegation that the government offi-

cers, though not acting *ultra vires,* were "carrying out official duties in violation of the Constitution." *Washoe Tribe of Nevada & California v. Greenley.* 674 F.2d 816 at 818 (9th Cir.1982). *See also Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 689-90, 69 S.Ct. 1457, 1461, 93 L.Ed. 1628 (1949); *Ex parte Young,* 209 U.S. at 149-60, 28 S.Ct. at 449-454. It is this theory the majority completely ignores and on which California rests its complaint.[1]

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[1]The concept of suits against persons in their "individual" instead of "representative" capacity appears to be a source of much confusion in this case. The majority does not distinguish between the two, and the district court merely stated conclusorily that "[l]ower court cases on point have drawn a distinction between suits against tribal members in their individual capacities, which may be maintained, and suits against them in their representative capacities, which may not be maintained." [E.R. 2]

This confusion, I think, derives from the fact that there are two types of suits against individuals, one invoking the doctrine of *Ex parte Young* and the other having nothing to do with that case at all. These two types of suits were discussed by the Supreme Court in *Larson v. Domestic & Foreign Corp.,* 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949). There the court noted that

> "If the officer purports to act as an individual and not as an official, a suit directed against that action is not a suit against the sovereign. [For example], [i]f the War Assets Administrator had completed a sale of his personal home, he presumably could be enjoined from later conveying it to a third person. On a similar theory, where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in way which the sovereign has forbidden."

Id. at 689, 69 S.Ct. at 1461.

While the Court in *Larson* seems to have believed that the two suits are founded "on a similar theory," they clearly are not. The suit to enjoin the sale of the house has nothing whatsoever to do with the sovereign. It is simply a suit against an individual who

California averred in its complaint a right to enter the reservation and apply its laws to non-Indians there pres-

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happens to work for the sovereign. The suit has no more to do with the government than a suit against a business executive arising out of a vacation traffic accident has to do with the company which employs him.

The suit against a government official for exceeding his statutory powers, however, stands on quite a different footing, for such a suit directly invokes the doctrine of *Ex parte Young*. In that suit, the claim is that, while acting under color of law the official went beyond his statutorily delegated power. Such a suit invokes the doctrine of *Ex parte Young* in that it is designed to enjoin an officer who, because he is acting beyond the scope of his authority, is acting in violation of federal law.

The difference between the two cases is that in the case of the suit against the government official, the official, though acting *ultra vires*, is acting under color of law. This is a theme common to all cases brought under the theories of *Ex parte Young*. For analytical purposes, therefore, I prefer to think of *Ex parte Young* as consisting of two branches. The first consists of suits alleging that as a result of an act, a government officer is acting in violation of federal law. The second consists of suits alleging that the officer, though not acting *ultra vires*, is acting under a statute or ordinance which is either preempted by federal law or directly violates the Constitution. Each branch, then, involves an allegation that an officer of the government acting under color of law, violated federal law.

Civil suits against individuals, on the other hand, I prefer to think of as those in tort or contract, unrelated to the conduct of the individual as an officer of the state and regarding acts not taken under color of law. These suits, obviously, have nothing to do with the doctrine of *Ex parte Young*.

When analyzed in this fashion this case becomes clear. California does not complain of any individual act. No one has tried to sell the state a house he does not own. Instead, California complains under what I have called the second branch of *Ex parte Young*. It complains that tribal officers, acting under an ordinance of the Tribe, are violating federal law in refusing state officers access to the Fort Yuma Reservation to enforce state fish and game laws. Whether such a complaint can be brought without running afoul of the doctrine of sovereign immunity is the question I believe we should be addressing today. *See infra*, Part II.

ent under "general principles of federal Indian law, upon the provisions of Public law 280, 18 U.S.C. § 1162, 28 U.S.C. § 1360, upon the provisions of the California Fish and Game Code, and upon other pertinent laws." It alleged that "defendants maintain that non-Indians who wish to fish or hunt while on [the] reservation need only comply with pertinent rules and regulations adopted by [the] tribe." Specifically, California contended that "defendants, in their capacity as officers of the Quechan Indian tribe, maintain that said tribe has exclusive jurisdiction to regulate the taking of fish and game by non-Indians while on the Fort Yuma Reservation, . . . [that] [d]efendants . . . claim that agents of the state of California cannot enter upon the Fort Yuma Reservation for the purpose of regulating fishing and hunting by non-Indians while on said reservation [and that they] . . . have refused to allow, and have prohibited, authorized agents of the State of California to enter upon the Fort Yuma Reservation for the purpose of enforcing State . . . laws. . . ." Furthermore, the state claimed, "[d]efendants have . . . threatened to arrest any authorized agent of the State of California who enters upon said reservation for the purpose of enforcing State fish and game laws against non-Indians." Finally, the state asked the district court to issue "a decree declaring that the State of California is authorized under federal law to apply its laws regulating the taking of fish and game to non-Indians while on the Fort Yuma Reservation, and that agents of the State of California are authorized under federal law to enter upon said reservation for the purpose of enforcing State fish and game laws against non-Indians." There was thus in the complaint the allegations necessary to inform all who read it that the state sought a declaratory judg-

ment that its theory of federal law was correct, and that the tribal officials could not forbid state officers from entering the reservation without violating federal law.

That is certainly enough to invoke what I have called the second branch of *Ex parte Young*. The state seeks a declaration that the tribal ordinance, which provided that non-Indians could hunt and fish on the Reservation with a permit from the tribe but without a California license, is in conflict with federal law, including federal statutes, and an injunction forbidding tribal officials from applying that ordinance to state officers. If its theory of law is correct, the ordinance may offend the Supremacy Clause and actions taken under color of that ordinance would thus be carried out in violation of the Constitution.[2] Since forbidding state officials from entering the reservation to enforce state laws is an act taken under color of that ordinance, the state clearly seeks to enjoin the "officers [from] carrying out official duties in violation of the Constitution," *Washoe Tribe of Nevada & California v. Greenley*, at 818. It is clear that California's complaint cannot be "saved by any amendment . . . which the [state] . . . could reasonably be expected to make," *Scott v. Eversole Mortuary*, 522 F.2d

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[2]I do not argue, as the majority suggests, that the Supremacy Clause is necessarily violated when officers of an Indian tribe violate state law when the state has been authorized by federal law to apply its statute. All we are required to decide at this stage of the litigation is that California has made a colorable claim that such is the case in these circumstances. Once it has done so, I see no jurisprudential consideration that would require us to consider first whether acts under color of the tribal ordinance offend federal law, and thus, the Supremacy Clause and then, only upon a finding of constitutional violation, to consider whether *Ex parte Young* applies to officers of Indian tribes.

1110, 1112 (9th Cir.1975); *Marshall v. Sawyer,* 301 F.2d at 643, for to amend the complaint to sue the officers as individuals, as the majority and district court demand, would change the gravamen of the state's entire claim. The state has complained of acts under color of an ordinance it alleges is constitutionally void. It has not complained of any *ultra vires* act. It is pointless, and certainly not "reasonable," to suggest that to appeal the district court's decision it must do so now.

I would thus hold the order appealable and would rule that the doctrine of *Ex parte Young* should be applied to suits against officers of Indian Tribes.

II

A

The doctrine of *Ex parte Young* was born out of practical necessity. It represents an accommodation of the principle of state sovereign immunity, as embodied in the Eleventh Amendment, and the principle that, to preserve meaningful supremacy of federal law, there must be a federal forum for the vindication of federal rights. J. Novak, R. Rotunda, J. Young, *Constitutional Law* 52 (1978) ("[T]he Eleventh Amendment was never intended nor held to grant the states the ability to subvert the supremacy clause by immunity from judicial orders to comply with federal law.") *See also* Novak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh Amendment,* 75 Col.L.Rev. 1413, 1445-46, 1455-58 (1975). The rule of *Ex parte Young* is compatible with the Eleventh Amendment because it permits suits for prospective and injunctive relief only—suits that generally place only an ancillary burden on state

treasuries. *See Edelman v. Jordan,* 415 U.S. 651, 663-68, 94 S.Ct. 1347, 1355-1358, 39 L.Ed.2d 662 (1974). Whether or not individual state officers are the nominal defendants, the Eleventh Amendment remains as a bar to suit for money judgments that would be paid from state treasuries. *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459, 464, 65 S.CT. 347, 350, 89 L.Ed. 389 (1945); *Edelman v. Jordan,* 415 U.S. at 666-69, 94 S.Ct. at 1357-1358.

The Supreme Court has extended the doctrine of *Ex parte Young* to embrace suits against federal as well as state, officials. *Larson v. Domestic & Foreign Corp.,* 337 U.S. 682, 689-90, 69 S.Ct. 1457, 1461, 93 L.Ed. 1628 (1949). It appears to have sanctioned the extension of that doctrine to Indian Tribes as well.

In *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed2d 106 (1978), plaintiffs brought an action for declaratory and injunctive relief against the Pueblo Tribe and its Governor, asserting that defendants were violating Title I of the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301-03. *Id.* at 51, 98 S.Ct. at 1673. Although the Court did not elaborate, it stated that "[a]s an officer of the Pueblo, [the Governor] is not protected by the tribe's immunity from suit . . . *cf. Ex parte Young,* 209 U.S. 123 [28 S.Ct. 441, 52 L.Ed. 714] (1908)." *Id.* at 59, 98 S.Ct. at 1677.[3] The suit against the Governor would clearly have

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[3]The Court in *Martinez* dismissed the claims against the Governor, holding that Congress had not intended to grant tribal members a federal cause of action under ICRA, except as provided in the statute. 436 U.S. at 72, 98 S.Ct. at 1681. Appellees read *Martinez* as holding that any suit that would bind a tribe through its tribal officers must fail for lack of a federal cause of action. I would disagree. Whether a suit may be maintained in the face of

bound the Pueblo tribe. The Court's suggestion that tribal immunity did not bar the suit against the Governor, along with its reference to *Ex parte Young,* indicates a willingness to apply the *Ex parte Young* fiction to tribal officers who violate federal law. *See also United States v. Oregon,* 657 F.2d 1009, 1012 n. 8 (9th Cir.1981) (tribal immunity extends to tribal officials acting in their official capacity *and* within the scope of their authority) (emphasis added).

Although I am hesitant to construe *Martinez* as a clear holding that *Ex parte Young* applies to Indian tribes, I am persuaded that both public policy and the jurisprudence of sovereign immunity compel that result.

B

Indian tribes no longer enjoy the status of independent sovereign nations. Through the exercise of the sovereign power of the United States, their status has been reduced to that of "domestic dependent nations." *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831). Although they continue to enjoy attributes of sovereignty, their sovereign powers are now subject to the will of Congress, which has plenary authority to limit, modify, or eliminate the sovereign powers of the tribes. *Santa Clara Pueblo v. Martinez,* 436 U.S. at 56, 98 S.Ct. at 1675 (1978). *See generally* Note, *In Defense of Tribal Sovereign Immunity* 75 Harv.L.Rev. 1058 (1982).

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sovereign immunity whether a particular federal statute gives rise to a cause of action are separate questions. We decide only the former; on remand, the district court must decide whether California has stated, or could state, a claim upon which relief can be granted under the relevant federal laws. *See* Fed.R.Civ.P. 12(b)(6).

Although tribal immunity is not constitutionally protected, courts have long recognized that Indian tribes possess "the common law immunity from suit traditionally enjoyed by sovereign powers." *Martinez,* 436 U.S. at 58, 98 S.Ct. at 1677. I am not persuaded that subjecting Indian tribes to federal court actions for prospective relief under *Ex parte Young* will unduly interfere with the sovereign powers of Indian tribes. Nor am I persuaded that tribal officers may, without a grant of authority from Congress, interfere with the enforcement of valid state laws, and then claim that the Tribe's sovereign immunity bars the state from suing for injunctive relief in federal court. Just as the sovereignty of a tribe must fall before the will of Congress, so too a tribe's immunity must yield when the state[4] brings suit to enforce prospectively the will of Congress.

The courts have recognized that tribal sovereign immunity protects Indian resources against the dissipation that would otherwise be caused by judgments against the tribes. *See Adams v. Murphy,* 165 F. 304, 308-09 (8th Cir.1908). Suits for prospective relief under *Ex parte Young* will, however, have only ancillary effects on tribal resources, and should not unduly jeopardize the tribal treasury. *Cf. Edelman v. Jordan,* 415 U.S. at 667-68, 94 S.Ct. at 1357-1358. ("[A]n ancillary effect on the state treasury is a permissible and often inevitable consequence of the principle announced in *Ex parte Young.*")

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[4]We do not reach the question whether tribal members may bring federal court actions for prospective relief against tribal officers. *Cf. Martinez,* 436 U.S. at 65-72, 98 S.Ct. at 1680-1681 (discussing limited role of federal courts as forum for resolving disputes between tribes and their members).

Appellees argue that the doctrine of *Ex parte Young* should not be applied "wholesale" to Indian tribes and their officers. They point out that the governmental structure of Indian tribes is often quite different from the structure of state or federal governments, and that the source and scope of a tribal officer's authority may often be impossible to ascertain with accuracy. Thus, they contend, federal courts should not presume to determine whether a tribal officer has acted beyond the scope of his tribal "statutory" authority. Brief of Appellees, 28-33. That issue, however, is not before us, as California alleges only that the Tribe's officers, acting under the authority of the Tribal ordinance, are violating California's rights under federal law.

In light of the foregoing analysis, I conclude that tribal sovereign immunity does not bar a suit for prospective relief against tribal officers alleged to be acting in violation of federal law.

III

Further delay in reaching the merits of the state's claim is not the only cost of failing to decide this appeal, for even if the distinction between suit of an individual instead of a representative was meaningful in this context, the majority disregards the fact that we function in the federal courts under a system of so-called "notice pleading." Federal Rule of Civil Procedure 8(a) provides that the complaint, to survive, must contain only "a short and plain statement of the grounds on which the court's jurisdiction depends . . . a short and plain statement of the claim showing that the pleader is entitled to relief and . . . a demand for judgment for the relief to which he deems himself entitled. . . ." Fed.R.Civ.P. 8(a). We no longer live under a system

"better calculated to vindicate scientific rules of pleading than . . . dispense justice." 5 C. Wright & A. Miller, *Federal Practice & Procedure* § 1202 at 61 (1969). Yet this is the regime to which the majority's approach hearkens a return. By insisting on niceties in the denomination of the parties when it is quite clear to all what California alleges and asks for in its complaint, the majority places pleading technique above its responsibility to decide important questions of federal law. That is what the change from common-law pleading and the Codes was intended to avoid.

IV

California is entitled to a determination whether the doctrine of *Ex parte Young* applies to Indian tribes. While the state is not, at this stage of the proceedings, entitled to a ruling on the merits of its claim, it should be told, without several years further delay, whether it can bring its claim at all. I would thus hold the order appealable and would rule that the doctrine of *Ex parte Young* should be applied to suits against officials of Indian Tribes acting under color of law in the same manner it is applied to suits against state and federal officials.[5]

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[5]The majority suggests that its decision upholds the integrity of the final judgment rule and, by so doing, ensures better decisions in this court by insisting on the full development of legal issues before the district court prior to our review. I fear the majority ensures only integrity of form and does so at the expense of timely justice.

The majority has seriously confused the final judgment rule with the rule governing appellate review of legal issues not raised before the trial court. As I have pointed out, because it would have been wholly futile for the state to amend its complaint as the majority suggests, the requirements of the final judgment rule have been fully complied with. That rule is thus irrelevant in this case.

If, however, the question the majority is really raising is whether it appropriate for us to reach the *Ex parte Young* issue when it was

The majority's decision today undermines both the system of notice pleading in the federal courts and the spirit of *Ex parte Young*. I believe it errs in so doing.

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not argued as fully as the majority would liked before the district court, I believe it errs in its conclusion on that point as well. It is clear to me that the state has raised allegations sufficient to invoke the doctrine of *Ex parte Young*. That it did not argue the doctrine below as well as the majority would have liked in no sense precludes our consideration of whether *Ex parte Young* applies in this case. Our job is not to remand with instructions to improve the quality of advocacy. The majority cites Judge Wallace's concurring opinion in *Quechan Tribe v. Rowe*, 531 F.2d 408, 412 (Wallace, J., concurring) for the proposition that the full development of legal issues before the district court would "provide us with a better foundation upon which to make our decision." The majority fails, however, to note that Judge Wallace was reluctant to decide the issue not raised at all before the district court in that case *only* because there exist[ed] an alternative ground . . . to sustain the judgment of the district court [therefore] there [would] be no miscarriage of justice" by refusing to decide the particular issue. Here, however, such is not the case. As the Supreme Court noted in *Hormel v. Helvering*, 312 U.S. 552, 557, 61 S.Ct. 719, 721, 85 L.Ed. 1037 (1941).

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which all courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not requires sacrifice of the rules of fundamental justice.

This case has been going on now, without so much as a hint of adjudication on the merits, for over seven years. The majority dismisses the appeal in the hope of achieving compliance with technical niceties and improvement of the advocacy below. If such a delay to achieve such goals is not a "sacrifice of the rules of fundamental justice," 312 U.S. at 557, 61 S.Ct. at 721, I do not know what is.

APPENDIX B

United States District Court
Southern District of California
Civil No. 79-1694-T
State of California,
Plaintiff,

vs.

Vincent Harvier, as Chairman of Quechan Tribal Council; et al.,
Defendants.

[Filed April 24, 1980]

ORDER GRANTING MOTION TO DISMISS

The State of California brings this action against various individuals who are officials of the tribe of Quechan Indians, in order to compel them to allow the State of California to enforce its fish and game laws on the Quechan reservation against non-Indians. The defendants bring the present motion to dismiss based on the doctrine of sovereign immunity of Indian tribes.

In an earlier action, the State proceeded directly against the Quechan tribe. The Ninth Circuit held that such a suit is barred by tribal immunity. *People of the State of California v. Quechan Tribe of Indians,* 595 F.2d 1153 (9th Cir. 1979).

This suit varies from the previous one only in that the defendants are not the tribe itself, but various members of the Tribal Council and the Fish and Game Warden of

the Tribe. The State of California argues that the doctrine of tribal immunity does not apply where the defendants are individual members of the tribe.

The United States Supreme Court has discussed the issue of the application of tribal immunity to individuals, but it has not established any clear directives. The Court has stated that under some circumstances a suit may be maintained against individual members of an Indian tribe, but has not enunciated any rule for determining those circumstances. See *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 59 (1978); *Puyallup Tribe v. Washington Dept. of Game,* 433 U.S. 165, 171-172 (1977).

Lower court cases on point have drawn a distinction between suits against tribal members in their individual capacities, which may be maintained, and suits against them in their representative capacities, which may not be maintained. *Bottomly v. Passamaquoddy Tribe,* 599 F.2d 1061, 1064 (1st Cir. 1979); *State of Wisconsin v. Baker,* 464 F.Supp. 1377, 1380 (W.D. Wisc. 1978).

The present claim is clearly brought against the defendants in their representative capacities. This is apparent from the caption of the complaint; it is also apparent in that the relief sought would compel the defendants to act as representatives of the tribe. In fact, plaintiff's counsel admitted during argument that this suit is brought against the defendants in their capacity as members of the Tribal Council.

Thus, the case law holds that a suit such as this is barred by the doctrine of the sovereign immunity of Indian Tribes.

Accordingly, the defendants' motion to dismiss is hereby GRANTED.

SO ORDERED.

Dated: April 24, 1980.

/s/ HOWARD B. TURRENTINE
United States District Judge

Office-Supreme Court, U.S.
FILED
JUL 2
ALEXANDER L. STEVAS

NO. 82-1915

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

STATE OF CALIFORNIA,

Petitioner,

v.

VINCENT HARVIER, as Chairman of Quechan Tribal Council, et al.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondents are dissatisfied with petitioner's statement of the first question presented for review: the issue of the sovereign immunity of Indian tribal officials. That issue was expressly not reached or decided by the Court of Appeals, and there is no decision on that issue to review. See Decision, Appendix A to Petition for Certiorari (hereafter "Pet. for Cert.") at A-6, A-7, and n. 1 at A-7, A-8; see also Pet. for Cert. at 6-7. By strictly limiting the scope of its decision, and declining to address the sovereign immunity question, the Court of Appeals narrowed the scope of appeal to the sole procedural question of the correctness of its determination that no appealable order was issued by the trial court. That, and that alone, is the only reviewable issue in this case.

The first question presented by Petitioner is thus irrelevant to the Ninth Circuit decision. While the question may be important and interesting, it is simply not properly before this Court, since

there is no sovereign immunity decision that is subject to review.

Respondent would also frame the second question presented in more specific terms, as opposed to petitioner's broader formulation: whether an order dimissing a complaint, but not the underlying action, is a final and appealable decision under 28 U.S.C. § 1291, where the plaintiff has not attempted to cure the pleading defect that led to the dismissal although he had an opportunity to do so.

PARTIES TO THE CASE

Pursuant to Federal Rule of Appellate Procedure 43(c)(1), successors in office to public officials are automatically substituted as parties. Thus, the correct names of the respondents, as of this date, are Vincent Harvier, President of the Quechan Indian Tribe; Phyllis Valenzuela, Joe Jackson, John Norton, Greg Yuma, and William Thomas, Tribal Council Members; and Neil Hill, Fish & Game Warden.

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STATUTORY PROVISIONS INVOLVED

Since the only issues decided by the Court of Appeals were the finality of the district court's action and the Court of Appeals' jurisdiction, there is no tribal immunity issue properly before this Court. The respondents therefore disagree with the first paragraph of petitioner's statement of the applicable law.

STATEMENT OF THE CASE

Respondents object to the characterization of petitioner's complaint below as "following the familiar practice in sovereign immunity cases of suing the official rather that (sic) the sovereignty." Pet. for Cert. at 3; Brief of Amici Curiae at 5. The entire basis for the district court's dismissal was the state's failure and persistent refusal to follow the familiar practice of suing public officers as individuals under the method established by Ex parte Young, 209 U.S. 123 (1908). California insisted instead on suing the tribal officers in their official capacity as tribal officers, candidly and repeatedly stating that this action was

brought against the tribe itself, rather than against the defendants in their individual capacities. See, e.g., Brief of Appellant before the Ninth Circuit (hereafter "Cal.Br.") at 11. ("[O]ur action must ... be considered as an action against the Tribe"); see also Pet. for Cert. at A-7, n. 1.

Relying on the authority of People v. Quechan Tribe, 595 F.2d 1153 (9th Cir. 1979), the district court held that such an action directly against the Tribe, rather than an Ex parte Young action against officers as individuals, was barred. This was in no way a decision on the merits; the implication of the district court's order was that the complaint should and could be amended to attempt to state an Ex parte Young suit against the officers as individuals. Rather than doing so, the state appealed.

The repeated contention of the state and its amici that the district court ruled that the state "cannot obtain relief against the tribal officials that cannot be obtained directly against the

Tribe," Pet. for Cert. at 4, Amici Brief at 6, is factually incorrect, and seriously mischaracterizes the actual ruling. No such statement appears in either the Order dismissing the complaint or in the hearing transcript, nor is it even implied; petitioner has created it out of whole cloth. In addition, the district court never ruled that "California was improperly 'trying to come in the back door' by suing tribal officials for relief which could not be obtained directly against the tribe," Pet. for Cert. at 4, n. 3. An examination of the cited page 11 of the Transcript reveals that the district court was simply making an observation about a supposed habit of the Court of Appeals, and no reference to any "improper attempt" by California appears. In fact, it may more fairly be read as an invitation to the state to accomplish indirectly what it was not allowed to do directly.

The Court of Appeals held that, since California could have been reasonably expected to amend its complaint to state a cause of action against the tribal officers in their individual

capacities, there was not an appealable order. It dismissed the state's appeal for lack of jurisdiction, expressly declining to reach the underlying immunity issues. Pet. for Cert., A-5 through A-8. The opinion noted that California had repeatedly refused to proceed on an Ex parte Young theory, and had disclaimed any unconstitutional actions by tribal officials. Id. at n. 1. Despite the absence below of such allegations, those two factors furnished much of the basis for Judge Norris' dissent, in which he argued that such allegations should defeat tribal immunity claims. The majority opinion, while agreeing that the concept was "novel and interesting," held that it was irrelevant in this case, since that is not what California had alleged and pleaded, nor was it necessary to decide, given its ruling on the procedural issue. Id. at A-6, A-7.

California's characterization of the majority and dissenting opinions, and its assertions as to their intent and effect, are more properly argument, and will be dealt with accordingly below.

To the extent that petitioner's statement of the case goes beyond the "facts material to the consideration of the question presented," Rule 21(g), respondents respectfully note their dissatisfaction with petitioner's presentation; nonetheless, the facts and chronology are essentially correct.

SUMMARY OF ARGUMENT

The Ninth Circuit ruled on only one question: the finality and and appealability of the district court's order. Nothing else was decided, and nothing else is subject to review before this Court; there is quite simply no sovereign immunity decision to review. California's attempt to transform this narrow decision into a broad review of the tribal sovereign immunity doctrine must fail, since the State in essence appeals a nonexistent decision.

California has attempted, throughout this litigation, to create a test case on sovereign immunity rather than addressing the merits of the underlying hunting and fishing dispute alleged in its complaint. That dispute, if it ever truly existed, has been mooted or at least largely vitiated by

the passage of time, changes in tribal administration, and subsequent cases, particularly this Court's recent decision in New Mexico v. Mescalero Apache Tribe, ___U.S.___, 51 U.S.L.W. 4741 (June 13, 1983).

The Ninth Circuit's ruling on the procedural question was correct. Because of its eagerness to appeal the immunity issue, California did not attempt to amend its complaint to state an Ex parte Young cause of action against the Tribal officers in their individual capacities, insisting repeatedly that its cause of action was against the Tribe itself. The fact that the trial court had held open the possibility of thus amending the complaint, by dismissing only the complaint and not the action itself, coupled with California's failure to request or obtain a final judgment regardless, left the case in a fragmented, preliminary posture wholly inappropriate for appellate review. Since there is no decision on sovereign immunity to review, and since the procedural issue was correctly decided, the petition should be denied.

ARGUMENT AGAINST GRANTING THE WRIT

I. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR DETERMINING SWEEPING QUESTIONS OF INDIAN LAW

A. There Is No Ninth Circuit Sovereign Immunity Decision To Review

As this Court has repeatedly pointed out, its role is limited and curtailed by Constitutional and statutory parameters, as well as its own policies. Generally, contentions and arguments that were not ruled upon by the Court of Appeals are deemed inappropriate for review. United States v. Fleischman, 339 U.S. 349, 365 (1950); Owens v. Union Pacific R. Co., 319 U.S. 715, 725 (1943); Stern & Gressman, Supreme Court Practice, § 2.7 (4th ed. 1969) ("issues decided by a court of appeals may be reviewed") (emphasis added). Thus, this Court has declared itself "in no position to pass upon" questions not resolved by lower courts, where such resolution "was unnecessary in the view they took of the case." Such a decision would be premature. Brooks v. United States, 377 U.S. 49, 54 (1949); see also Boeing Co. v. Van Gemert, 444 U.S. 472,

482 n. 8 (1980) [review limited to issues determined by Court of Appeals].

The Ninth Circuit took special pains to point out that, under its view of the case, the various sovereign immunity arguments were irrelevant to its decision, and thus were neither considered nor decided: "[I]t is simply not necessary to reach the [sovereign immunity] issues discussed in the dissent." Pet. for Cert. at A-7. Petitioner admits, as it must, the limited scope of that decision. Pet. for Cert. at 19-20. The Court of Appeals correctly observed that the undeveloped record in the trial court was "wholly inadequate" to reach the "important and complex issues of law" the state once again attempts to raise in this petition. Id. at A5-A6. Absent any decision on the immunity issues, there is simply no question concerning them pre-

sented for review.[1]

The state has candidly admitted in previous correspondence that it is not particularly troubled by the fish and game and "threat of arrest" issues it alleges as the basis for its action, but that instead its "primary objective and purpose for filing a motion with the Court of Appeals was to expedite the issue of California's right to sue tribal officers." Letter of E.C. Fullerton, Director, California Department of Fish and Game, to Tribe's Attorney, October 15, 1980, Appendix A to this Brief. While the letter was not made part of the record below, respondents request this Court to

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[1]Petitioner's unsupported assertions that the decision somehow "effectively extends the tribal immunity doctrine," Pet. for Cert. at 14, and that without Supreme Court review "the case is over for all practical purposes," Pet. for Cert. at 17, fly in the face of the express holding of the Court of Appeals: that the state must now plead its action properly and obtain a final resolution before its appeal will be heard. Far from closing the door on the case, the Ninth Circuit's ruling constitutes an open invitation to proceed to a resolution on the merits.

take judicial notice of it at this time pursuant to Federal Rule of Evidence 201. The absence of an adequate record below illustrates the dangers of attempting to try the case in the first instance at the appellate level, since many potentially relevant facts and writings will not be in the record. See, e.g., Pet. for Cert. at 12, n. 7.

The State's Petition for Certiorari makes it clear that it is still attempting to escalate a straightforward decision on a rather esoteric point of federal civil procedure into a landmark case on tribal sovereign immunity, despite the fact that the Court of Appeals expressly refused to reach or decide any immunity issues. Even Judge Norris' dissenting opinion recognizes that only through a different resolution of the procedural question could the Court of Appeals have reached the sovereign immunity issues. Id. at A-19. That procedural issue is the only proper subject for review; there is no court of appeals decision on tribal sovereign immunity.

B. Subsequent Events and Case Law Have Effectively Vitiated Any Live Controversy

Where interim changes or events have eradicated the effects of an alleged violation, no live controversy exists and further judicial proceedings are not justified. County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979); Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). Since the time of the Tribal Council action complained of,[2] this Court and the Courts of Appeal have greatly clarified and settled many of the underlying issues of tribal rights to control non-Indian hunting and fishing on reservation land, the gravamen of the state's suit. See, e.g., Montana v. United States, 450 U.S. 544 (1981); New Mexico v. Mescalero Apache Tribe, ___U.S.___, 51 U.S.L.W. 4741 (June

[2]The actions complained of took place in 1976, and resulted in California bringing People v. Quechan Tribe, 595 F.2d 1153 (1979). Cal.Br., 2-3; Brief of Appellees before Ninth Circuit [hereafter "App.Br."] at 9, n. 3.

13, 1983); State of Wisconsin v. Baker, 698 F.2d 1323 (7th Cir. 1983). The Mescalero decision's holdings on the preemptive effect of tribal authority to regulate reservation non-Indian hunting and fishing, and the nullifying effect of allowing concurrent state jurisdiction, control many of the central issues in this case: California complains primarily of tribal jurisdictional assertions that have now been upheld by this Court. Id. at 51 U.S. L.W. 4745-46. The broad power of the Tribe to exclude non-members, another basis of controversy claimed by California, has also been repeatedly reaffirmed in the intervening years. Mescalero, supra, at 51 U.S.L.W. 4743; Montana, supra; Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). There may be very little legal basis for disagreement between the parties at this point. If there is no live controversy on the merits, the procedural and immunity questions become irrelevant, and need not be determined.

Besides the legal changes, there have also been numerous changes in political administration at Quechan, since Tribal Council elections are held every two years, and elections for Tribal President and Vice-President are held every four years. Quechan Tribal Constitution, Article III (Appendix to App.Br.). The terms of the Council members who allegedly expressed the belief sometime in 1976 that the Tribe had exclusive jurisdiction to regulate the taking of fish and game by non-Indians have long expired; there is no indication in the record of the position of subsequent tribal administrators. As this Court has pointed out, "past exposure to illegal conduct does not in itself show a present case or controversy ... if unaccompanied by any continuing, present adverse effects." O'Shea v. Littleton, 414 U.S. 488, 495-6 (1974).

Without further trial court proceedings, it is not possible to say with certainty whether any substantive issues or disputes between the parties still exist, after the various legal and political changes. It is clear, however, that Supreme Court

review of ancillary issues would only serve to further prolong the litigation. Since the stale and outdated allegations of California's complaint furnish no present basis for suit, review should be denied on that basis alone.

II. CALIFORNIA'S CLAIMED RELIANCE ON CONSTITUTIONAL VIOLATIONS BY TRIBAL OFFICERS IGNORES ITS OWN DISCLAIMER

Judge Norris states in his dissenting opinion, Pet. for Cert. A-8 through A-23, that California "rests its complaint" upon allegations that Quechan's officers were carrying out their duty in violation of the Constitution, and bases his dissent primarily on the concept that this case falls under what he calls "the second branch of Ex parte Young." Id. at A-11. The state now eagerly adopts this analysis as well, Pet. for Cert. at 7, n. 5; 15-17, while ignoring both its own express disclaimer of such a basis for decision before the Court of Appeals, Cal.Br. at 12, n. 10 ("It is not necessary to reach this question here"), and its failure to make any such allegations before the district court. Complaint, paragraph 7.

The issue of whether an assertion of tribal authority is unconstitutional (instead of or in addition to being ultra vires an officer's powers) was never presented to, briefed, or argued before either the trial court or the Court of Appeals. App.Br. at 26, n. 21. As Judge Norris correctly points out, the legal analysis of a case of alleged unconstitutional (as opposed to merely ultra vires) conduct proceeds along markedly different lines from those briefed and argued here. Pet. for Cert. at A-11, n. 1. Again, California seeks to transform the case before this Court into something it is not. Had it alleged the unconstitutionality of Quechan's officers' actions in its pleadings before the trial court, the parties could have developed the necessary factual and legal background on which meaningful appellate review depends, rather than raising new issues in a factual vacuum. Having made the choice not to allege or argue possible constitutional matters below, California cannot now raise the issue, through the bootstrap of a dissenting opinion, before this Court.

III. PETITIONER MISAPPREHENDS THE NATURE OF SUITS AGAINST OFFICERS IN THEIR INDIVIDUAL CAPACITIES

A major issue in this case has been California's unwillingness to accept the long-sanctioned rule that suits against officers acting under color of law must be brought against them in their individual capacities, alleging that their actions exceeded their authority. Ex parte Young, 209 U.S. 123 (1908). Such a form of pleading avoids sovereign immunity bars through what may appear to be somewhat of a "legal fiction": that the officer, and not the sovereign, is the defendant. As Professor Davis has pointed out, the court in Young was aware that it was engaging in a "fiction" by holding that the suit was against Young as an individual instead of the state:

> ... the Court well knew that the Attorney General was still the Attorney General while he was enforcing the statute, and the Court well knew the effect of enjoining the Attorney General was to enjoin the state ...

Davis, K., Suing The Government By Falsely Pretending To Sue An Officer, 29 U.Chi.L.Rev. 436, 437 (1962). [Hereafter "Suing the Government".]

There are sound policy reasons for such a pleading convention. This "legal fiction" has been called "indispensable to the establishment of constitutional government and the rule of law." Perez v. Ledesma, 401 U.S. 82, 110 (1971) (separate opinion by J. Brennan), see also C. Wright, Handbook of the Law of Federal Courts 186 (2d ed. 1970). Part of the justification is the impressive body of precedent that has grown out of it, to which courts and litigants may look for guidance:

> ... [t]he false pretense made by the Court in Ex parte Young has been the mainstay in challenging governmental actions through suits for injunctions and declaratory judgments.

Suing the Government, at 437.

Petitioner does not suggest, nor does any sound basis exist, for overturning nearly a century of established precedent. At the pleading stage, it makes little practical difference to litigants. Petitioner's arguments that pleading in such a standard manner would not have provided adequate relief are incorrect as a matter of law.

A. Petitioner's Suit Survives Changes of Tribal Officers

The injustice of mooting a plaintiff's suit when a defendant public officer is replaced in office led to the adoption in 1961 of the current version of Federal Rule of Civil Procedure 25(d)(1). That subsection provides for automatic substitution of successor "public officers," a broad term intended to include the entire class of persons sued for actions arising from their public (as opposed to purely private) actions, with very limited exceptions.[3] Tribal officers have been deemed "public officers" for the purposes of the Rule. Sturdevant v. Deer, 73 F.R.D. 375, 379 (1976).

The scope of the Rule clearly extends to "Ex parte Young" type suits, without requiring resolu-

[3]The major exception would be where the case seeks money damages from the officers' personal assets. Advisory Committee's Note of 1961 to Subdivision (d). Similar provisions are found at Federal Rule of Appellate Procedure 43(c)(1) and Supreme Court Rule 40.3.

tion of possible sovereign immunity defenses. The Rule is procedural rather than substantive, recognizing that suits nominally against officers in their individual capacities may often require substitution when a new person takes office:

> The expression 'in his official capacity' is to be interpreted in its context as part of a simple procedural rule for substitution; care should be taken not to distort its meaning by mistaken analogies to the doctrine of sovereign immunity from suit or the Eleventh Amendment. The amended rule will apply to all actions brought by public officers for the government, and to any action brought in form against a named officer, but intrinsically against the government or the office or the incumbent thereof whoever he may be from time to time during the action. Thus the amended rule will apply to actions against officers to compel performance of official duties or to obtain judicial review of their orders. It will also apply to actions to prevent officers from acting in excess of their authority or under authority not validly confered, cf. Philadelphia Co. v. Stimson, 223 U.S. 605 (1912), or from enforcing unconstitutional enactments, cf. Ex parte Young, 209 U.S. 123 (1908); Ex parte La Prade, 289 U.S. 44 (1933). In general it will apply whenever effective relief would call for corrective behavior by the one then having official status and power, rather than one who has lost that status and power through ceasing to hold office.

Advisory Committee's Note to Subdivision (d) (1961).

The express intent of the Rule is to prevent the sort of problem over which California expresses concern at pages 13 and 19 of its Petition: that the Tribe could defeat the suit by electing new officers. As Professor Moore points out, the Rule:

> neither enlarges nor abridges the actions which can be brought by or against a governmental officer. It does not add to nor detract from the doctrine of sovereign immunity, nor does it allow an action against a state which is otherwise barred by the Eleventh Amendment. And as the above-quoted extract from the Advisory Committee's Note points out, the interpretation of 'official capacity' should not become beclouded with concepts that are appropriate to the doctrine of sovereign immunity or the Eleventh Amendment but are inappropriate to describe the functioning of Rule 25(d).

3B Moore's Federal Practice, Para. 25.09 (1982).

Thus, petitioner's major objection to suing the officers in the normal manner as "individual" defendants -- that the changing officeholders may make resolution on the merits impossible to obtain -- has been moot since 1961, when the Rule was amended to allow for automatic substitution. The defendants have been and will continue to be the

Tribe's current president, council members and game warden, whether sued as individuals or in their official capacities. Petitioner's concern that complying with normal pleading rules would somehow "change the gravamen of the state's entire claim," Pet. for Cert. at 16, illustrates a profound misunderstanding of the operation of Rule 25(d), which, without delving into the complexities of immunity law, provides a simple and effective procedural solution to petitioner's imagined problem.

B. California Fails To Articulate Any Reasonable Explanation Or Justification For Its Stubborn Failure To Follow Basic Pleading Rules

California's other expressed reason for refusing to bring its complaint in the normal fashion (by suing the tribal officers as individuals for their official actions) is that the alleged grievance arises from "official" rather than personal conduct. As discussed above, this is precisely the situation governed by Ex parte Young, which created what is essentially a legal fiction to avoid the absolute bar of sovereign immunity.

Merely suing officers as individuals for "official" acts does not, of course, automatically remove all sovereign immunity considerations in this case, as the Tribe pointed out in its argument before the Court of Appeals. It does, however, present the proper posture for the trial and appellate courts to consider the relevant issues, in accord with long-standing precedent. There was simply no valid reason for California to refuse to amend its complaint to come within the Ex parte Young pleading convention. That is the central holding of the Ninth Circuit decision: that California, like all other plaintiffs, must properly plead its cause of action under standard rules to allow consideration of the merits of its position, and that its failure to amend its complaint, despite the obviousness of the solution, transforms the controversy from one of substance to one of simple procedure. California continues to press potentially far-reaching substantive claims in a case where defendants have not even answered yet, and where the true issues have thus not yet been joined.

Such piecemeal appellate review is clearly disfavored. Goldstein v. Cox, 396 U.S. 471, 478 (1970); Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945):

> Since its establishment, it has been a marked characteristic of the Federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance.

Johnson, supra, at 124.

This case was barely begun when California chose to appeal rather than to amend its complaint. Many potentially determinative issues were never raised. Even if California had prevailed on the sovereign immunity question, that is merely a threshold issue in deciding the underlying lawsuit, the resolution of which may well trigger further appeals. Judicial economy requires that where a plaintiff can amend a complaint it should be done before appealing the procedural ruling; only when no possible amendment will cure the defect is there

an appealable issue.[4] Despite petitioner's arguments to the contrary both before this Court and the Court of Appeals,[5] it could have and should have amended its complaint, thus saving needless extra years of pointless litigation, of which it now complains. Pet. for Cert. at 6. At best, it could

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[4]See discussion of the appealability issue in Part IV, infra. Petitioner's other option was to stand on its original complaint, a course of action it at least arguably attempted in the Ninth Circuit and seems to continue to press here. Given its admission that its suit as pleaded is against the Tribe, and the controlling effect of People v. Quechan Tribe, 595 F.2d 1153 (9th Cir. 1979) which expressly forbade such a suit, that course of action would seem to be obviously futile, since California is precluded from relitigating the issue of jurisdiction over the Tribe. American Surety Co. v. Baldwin, 287 U.S. 156 (1932). What the state in reality is asking for is that its flawed complaint against the Tribe be construed as an Ex parte Young suit against the officers, a construction that the state's own admissions and arguments, as well as the allegations of its complaint, make impossible.

[5]Counsel for the state later retracted his mistaken assertion at oral argument before the Ninth Circuit that the trial court had denied leave to amend the complaint. Declaration of Roderick Walston in Response to Court's Order of November 18, 1981, at 1-2. Thus, petitioner's assertion that relief is unobtainable under any possible amendment, Pet. for Cert. at 6, n. 4, is once again simply incorrect.

have proceeded to the merits of its suit then; at worst, if the properly pleaded complaint were still held insufficient to overcome the immunity defense, there would have been a clear and properly framed appealable issue. Instead, California achieved neither.[6] Having shot itself in the foot, the state cannot now complain of the hole in its shoe.

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[6]Such actions, while puzzling from the normal litigation point of view, make more sense in light of the state's admission that it was attempting to set up a test case on sovereign immunity rather than resolving the alleged hunting and fishing controversy pleaded in its complaint, as discussed supra.

IV. CALIFORNIA'S OBJECTIONS TO THE APPLICATION OF THE FINAL JUDGMENT RULE ARE INSUBSTANTIAL BECAUSE OF ITS CLEAR OPPORTUNITY TO AMEND ITS COMPLAINT

A. The Final Judgment Rule Being Entirely Jurisdictional Cannot Be Applied With Reference To Its Effects On Individual Litigants

The "final judgment rule," 28 U.S.C. § 1291, limits appellate jurisdiction to the review of final decisions of the district courts. It is firmly rooted in American jurisprudence, traceable to the Judiciary Act of 1789.[7] The purpose of the finality rule is to guard against multiple appeals, prior to a full adjudication in the trial court, which could result in piecemeal litigation. Cobbledick v. United States, 309 U.S. 323 (1940),[8] Catlin v. United States, 324 U.S. 229 (1945).

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[7] Act of Sept. 24, 1789, 1 Stat. 73.

[8] The Court in Cobbledick elaborated that the rule was also intended to avoid harrassment and a possible succession of separate appeals that could "enfeeble judicial administration."

The district court neither rendered nor entered a final judgment under 28 U.S.C. § 1291 and Fed.R.Civ.P. 58. The Ninth Circuit found that appealability turns ultimately on finality, and that the preliminary dismissal of a complaint, without denying leave to amend, is not a final and appealable order. Since petitioners did not obtain a clear final order, it failed to perfect its appeal.

California is correct in noting that the final judgment rule has been liberally construed to allow review in special cases when certain factors are present.[9] However, petitioner is incorrect in suggesting that equitable considerations should govern that which is entirely a jurisdictional question. United States v. Anderson, 464 F.2d 1390,

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[9]Most notable among these are 28 U.S.C. § 1292, allowing appeal of certain interlocutory orders; the rule of Forgay v. Conrad, 47 U.S. (16 How.) 200 (1848) allowing immediate appeal of certain property transfer orders when only ministerial acts remain; and "special circumstances" allowing appeal when it is clear the action could not have been saved by any amendment of the complaint, Marshall v. Sawyer, 301 F.2d 639 (9th Cir. 1962).

1392 (D.C. Cir. 1972).

In the present case, the Court of Appeals determined that none of the special factors or circumstances allowing for immediate appeal existed, and properly dismissed the action. However unfortunate the effect on petitioner's case, the propriety of an appeal is an essential jurisdictional requirement all litigants must satisfy: "The considerations that determine finality are not abstractions but have reference to very real interests -- not merely those of the immediate parties, but, more particularly, those that pertain to the smooth functioning of our judicial system." Republic Natural Gas Co. v. State of Oklahoma, 334 U.S. 62, 67 (1948). Professor Moore also recognizes that the rule should not be applied to fit the needs of individual litigants: "The prevention of useless expenditure is best served in most cases by overlooking the plight of particular litigants and maintaining the final judgment rule." 9 Moore's Federal Practice § 110.12, (1982).

Petitioner had other avenues open to it, in addition to amendment of its complaint, that could have cured its jurisdictional omissions.[10] It chose instead to ignore clear statutory and case authority in taking its appeal. California now attempts to remedy this jurisdictional deficiency through a writ of certiorari to this Court.

B. There Is Little Or No True Conflict Between The Courts Of Appeal

Although petitioner and its amici argue that a conflict exists in the courts of appeal on the issue of the appealability of an order dismissing the complaint but not the entire action, the conflict is more apparent than real. The Ninth Circuit's decision below, far from being a minority position, is in accord with rulings in virtually every circuit which has considered this question.

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[10] For example, petitioner could have requested the entry of a separate judgment document nunc pro tunc, or asked leave of court to supplement the record to include a separate judgment entered subsequent to the docketing. 6A Moore's Federal Practice § 58.08 (1982); FRAP 10(e).

Most importantly, however, this Court has also ruled that when a complaint may be amended, the judgment is not final. Jung v. K & D Mining Co., 356 U.S. 335 (1958). The Court held that the district court's order dismissing the complaint "left the suit pending for further proceedings either by amendment of the [complaint] or entry of a final judgment," id. at 336-337, citing Missouri & K.I.R. Co. v. Olathe, 222 U.S. 185 (1911).

Thus, the decision below simply follows the rule, enunciated by this Court and adhered to by the overwhelming majority of the Courts of Appeal, that preliminary dismissal of a complaint without denying leave to amend is not a final and appealable order. Borelli v. City of Reading, 532 F.2d 950 (3d Cir. 1976); Austracan, (U.S.A.) Inc., v. M/V Lemoncore, 500 F.2d 237 (5th Cir. 1974); Azar v. Conley, 480 F.2d 220 (6th Cir. 1973); Grantham v. McGraw Edison Co., 444 F.2d 210 (7th Cir. 1971); Local 179, United Textile Workers v. Federal Paper Stock Co., 461 F.2d 849 (8th Cir. 1972);

Sherr v. Sierra Trading Corporation, 492 F.2d 971 (10th Cir. 1974).

The Sixth Circuit's opinion in Azar v. Conley, supra, best illustrates the unanimity of the rule:

> There is a considerable body of case law, which appears to us to be well-founded, distinguishing between a judgment which dismisses the action and therefore is a final judgment and one that only dismisses the complaint without dismissing the action. The latter is not appealable if the complaint may be saved by amendment.

Id. at 223.

The apparent minority position of the Second Circuit is that unless express leave to amend is granted, the dismissal of the complaint operates to dismiss the entire action. Elfenbein v. Gulf & Western Industries, Inc., 590 F.2d 445 (2d Cir. 1978).[11] While this rule may have the benefit of simplicity, it ignores the reality that often courts

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[11] This view is based on the Second Circuit's position that the right to amend a complaint without leave of court terminates upon the granting of a motion to dismiss. Elfenbein at 448, ft. n. 1. Petitioner, however, brought its action within the Ninth Circuit where the free amendment right clearly remains. Richardson v. United States, 336 F.2d 265 (9th Cir. 1964).

do not expressly specify whether leave to amend is granted or denied. This is precisely what occurred in the instant action.

In the majority of cases an amendment to correct pleading and similar defects is possible, and leave to amend is assumed even if not expressly granted. Wright & Miller, Federal Practice and Procedure, Vol. 6 §§ 1473, 1483 (1976). Richardson v. United States, 336 F.2d 265 (9th Cir. 1964). In light of the mandated liberal application of Fed.R. Civ.P. 15, authorizing liberal amendment of pleadings, it would seem the better practice to assume a right to amend unless that right is specifically denied.

Despite the difference in language, the Second Circuit's holding can be reconciled by looking to the underlying rationale: that an appeal is proper only when proceedings are concluded in one way or another in the trial court. As explained above, petitioner had the option to amend its complaint to state an Ex parte Young theory. It

also had the option to stand on its complaint and request entry of final judgment on that basis. It did neither, leaving a jurisdictional vacuum that the Court of Appeals recognized as inadequate in that there was no final action to review.

C. The Court Of Appeals Was Not Bound By The Earlier Motions Panel Ruling

A basic principle of federal jurisdiction is that a court must consider its own power to hear a case, and cannot act beyond its appellate jurisdiction. Brown Shoe Co. v. United States, 370 U.S. 294, 305-306, (1962). Thus it was not improper for the Court of Appeals on its own motion, to review its jurisdiction to hear this case.

Petitioner states that it was entitled to rely on the appellate motion panel's earlier ruling denying appellees' motion to dismiss, and that the decision panel could not reconsider the issue. Such is not the case. In Green v. Department of Commerce, 618 F.2d 836 (D.C.Cir. 1980), an appellate motion panel had earlier refused to dismiss an appeal where the motion was brought on the basis

that it was not a final judgment. The decision panel subsequently reconsidered the issue on its own motion, and dismissed the appeal stating: "The earlier action of the motions panel does not free this Court from the independent duty to decide whether we have jurisdiction." Green, supra, at 839, n. 9; see also, United States v. Imperial Irrigation District, 559 F.2d 509, 520 (9th Cir. 1977); Russell v. Commissioner, 678 F.2d 782, 785 (9th Cir. 1982), [appellate courts have the power to reconsider issues previously decided.]

The power to reconsider a decision seems especially appropriate when the issue is as basic as a jurisdictional inquiry: "[T]he power [28 U.S.C. § 1291] belongs entirely to the courts of appeals, and it should be guarded with extreme care." 9 Moore's Federal Practice § 110.12 (1983). Since jurisdiction cannot be conferred by the parties,[12] a court must make certain that an

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[12] Brown Shoe Co. v. United States, 370 U.S. 294, 305 (1962).

appeal is properly before it. Thus, the Court in the present action necessarily reviewed its appellate jurisdiction, and, finding it lacking, properly dismissed the appeal.

V. TRIBAL SOVEREIGN IMMUNITY IS STILL VITAL TO THE PROPER FUNCTIONING OF INDIAN TRIBAL GOVERNMENTS

Petitioner and amici argue for a sweeping "re-examination" of the tribal immunity doctrine, maintaining that since tribes "stand on a lesser sovereign footing than the states" such an immunity is not legally or practically justified. Pet. for Cert., 19-20, Amici Brief at 13. Tribal sovereign immunity has stood since the early days of the Republic as a bulwark against outside incursions on tribal authority, and today, in an era of burgeoning litigation, is more crucial than ever for Indian governments. See Note, In Defense of Tribal Sovereign Immunity, 95 Harv. L.Rev. 1058 (1982).

As the author of the note points out, the doctrine is still needed to protect federal policies of

tribal self-determination, economic development, and cultural autonomy. Id. at 1058. Although many common law governmental immunities have been curtailed or abolished in recent years, this Court has consistently upheld the doctrine as applied to Indian tribes. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978).

One important policy justification for such immunity is the need to protect scarce tribal assets, and to prevent diversion of governmental funds (both of the Tribe and the federal government, which financially supports most Tribal governments at least in part) from substantive programs to payment of money judgments and litigation expenses. While direct money damages are obviously the most threatening in this regard, the extremely high costs of litigation -- particularly appellate litigation -- make the defense of unconsented injunctive or declaratory relief suits financially burdensome as well. The sheer number of state amici warns of the amount of unconsented litigation tribes may expect if their immunity from

suit is abolished. That fragile immunity is, in many cases, Indian tribes' only shield against a plethora of suits from traditionally hostile state authorities.

In addition, the unrestrained availability of equitable suits, especially to challenge general assertions of authority rather than specific actions, offends the well-established rule that governments should be given the widest possible latitude in the conduct of their internal affairs, making even equitable suits in such areas often inappropriate. Rizzo v. Goode, 423 U.S. 362, 379 (1976). The tribal immunity doctrine advances the strong federal policies of tribal autonomy and self-determination, by helping to protect Indian tribes from such invasions of their governmental perogatives. The doctrine also protects cultural diversity, by refusing to force Indian governments to conform to non-Indian governmental norms, and minimizes the risk that a non-Indian reviewing court might misinterpret or ignore tribal laws, customs and traditions.

Any alteration to the tribal immunity doctrine should in any event come from Congress, not the judiciary. As Thebo v. Choctaw Tribe, 66 F. 371 (8th Cir. 1895), held many years ago:

> It may be conceded that it would be competent for Congress to authorize suit to be brought against the Choctaw Nation ... but no court has ever presumed to take jurisdiction of a cause against [Indian tribes] in the absence of an act of Congress expressly conferring the jurisdiction in the particular case.

Id. at 373-374.

Of course, as pointed out supra, this case is wholly inappropriate to decide questions of of sovereign immunity not passed upon by the Court of Appeals. In addition, though, federal law and policies indicate that judicial abrogation of the doctrine would be both unwarranted and unwise.

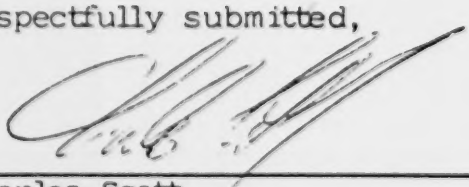
CONCLUSION

The Ninth Circuit neither considered nor decided any sovereign immunity issue, and for that reason the writ of certiorari as to sovereign immunity issues is inappropriate and should be denied. The remaining procedural ruling is correct, since it upholds principles of sound judicial management by mandating finality at the trial court level before an appeal will lie. No split in the Courts of Appeals exists as to the basic principle that finality is required to appeal, and whatever minor differences exist between the circuits in establishing that finality do not merit resolution by this Court.

For the above reasons, the writ should be wholly denied.

Dated: June 30, 1983

Respectfully submitted,



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RECEIVED OCT 20 1980

STATE OF CALIFORNIA—RESOURCES AGENCY

EDMUND G. BROWN JR., Governor

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October 15, 1980

Charles Scott
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Dear Mr. Scott:

In your letter of October 2, 1980, you suggested that representatives from the Quechan Indian Tribal Council and the Department of Fish and Game meet and discuss our cooperative working relationship on Reservation lands. We are always available and anxious to get together if it may help the wildlife resources in California and those who enjoy them.

I believe your reference to the "potentially violent situation existing between state and tribal fish and game officers" was in fact an earlier concern of ours but one that fortunately did not materialize. Both the Reservation officers and our state wardens have made a sincere effort to get along in a difficult situation.

Actually, the level of on site harmony between our officers is not an issue. Our primary objective and purpose for filing a motion with the court of appeals was to expedite the issue of California's right to sue tribal officers. We feel strongly that the court must litigate that issue soon.

With this in mind, I would be pleased to have appropriate numbers of my staff meet with Quechan Tribal Officers and discuss any aspect of our enforcement relationship on Reservation lands.

As you suggest, our respective attorneys could be present, however, it seems to me that our personnel might feel freer to discuss future work plans and leave the appeals issue to the courts, if our attorneys were not present.

Either Fred Worthley, Regional Manager for our southern region or Ned Dollahite, Chief of the Wildlife Protection Branch in Sacramento, would be capable representatives for this Department. Fred Worthley can be contacted at (213) 590-5177 and Ned Dollahite at (916) 445-5431.

E C Fullerton
Director

Office-Supreme Court, U.S.
FILED
JUL 21 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1915

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

STATE OF CALIFORNIA,
Petitioner,

vs.

VINCENT HARVIER, as Chairman of the Quechan Tribal Council, *et al.*,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

This brief is in reply to the respondents' brief opposing the petition for writ of certiorari.

I

THE RESPONDENTS INCORRECTLY ARGUE THAT THE MAJORITY OPINION DOES NOT REACH THE MERITS OF THE TRIBAL IMMUNITY ISSUE

The respondents' main argument in their opposing brief is that the majority opinion decided only a narrow issue concerning the appealability of dismissal orders, and did not reach the merits of the tribal immunity issue under *Ex parte Young*, 209 U.S. 123 (1908). Res. Br. 7-10. Thus, it is argued, no reviewable tribal immunity issue is before this Court. *Id.*

In fact, the majority opinion is based on a specific, and we believe faulty, interpretation of the *Ex parte Young* doctrine as applied in the tribal context. Under this doctrine, actions can be maintained against sovereign officials to restrain unlawful conduct undertaken on behalf of the sovereign, but not to obtain monetary relief that would be ultimately paid out of the sovereign treasury. *Ex parte Young,* 209 U.S. 123, 155-156 (1908); *Edelman v. Jordan,* 415 U.S. 651, 664 (1974). In other words, the doctrine authorizes suits for prospective but not retrospective relief. *Edelman,* 415 U.S. at 664. Importantly, the immunity of the sovereign official depends on whether the complaint seeks prospective or retrospective relief, not on whether he is *named* in the complaint in an "official" or "individual" capacity.[1] Indeed, in *Larson v. Domestic & Foreign Corp.,* 337 U.S. 682, 687 (1949), this Court stated:

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[1]In *Ex parte Young,* the Court held that a state official, in order to be sued, "must have some connection with the enforcement of the act," 209 U.S. at 157, and that a state official could not be sued where he had "no duty at all with regard to the act," *id.* at 158. In *Edelman,* the Court held that *Ex parte Young* bars actions for "retrospective" but not "prospective" relief against the state. 415 U.S. at 664.

> "If the denomination of the party defendant by the plaintiff were the sole test of whether a suit was against the officer individually or against his principal, the sovereign, our task would be easy. . . . But controversy there has been, in this field above all others, because it has long been established that *the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign.*" (Emphasis added.)

Therefore, the immunity question turns on the nature of relief sought, not the denomination of the defendant in the complaint.

The majority opinion below was thus wrong in holding that California *may* have been able to state a valid claim simply by amending its complaint to name the tribal officers in their "individual" capacity.[2] Since, under *Ex parte Young,* the immunity of the officer depends on the nature of relief sought rather than the styling of the complaint, the district court, in dismissing the complaint, necessarily held that California could not obtain the relief sought regardless of the styling of the complaint.[3] Indeed, if the district court meant to hold the opposite—that California

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[2]Significantly, the majority opinion does not hold that California *can* obtain the desired relief by changing the styling of the complaint, but only that California must change the styling before the question is addressed.

[3]Indeed, the district court order made this result clear, stating that the case is brought against the defendants in their "representative" capacities in part because "the relief sought would compel the defendants to act as representatives of the tribe." Pet. App. 22. Even if California amended its complaint to name the defendants in their "individual" capacities, it would still seek relief that "would compel the defendants to act as representatives of the tribe." Also, as indicated in the petition, the district court indicated in other ways that California could not obtain relief against the tribal officials that would indirectly affect the Tribe itself. Pet. App. 4 n. 3 and accompanying text.

could obtain such relief simply by changing the styling of the complaint—it would have misapplied *Ex parte Young,* which as noted above holds just the opposite. Thus, the dismissal order effectively precluded California from obtaining the relief sought, regardless of the styling of the complaint. Unless the Court grants the petition for writ of certiorari, the case is over for all practical purposes, assuming a proper interpretation of *Ex parte Young.*

The majority opinion thus took a contorted view of the *Ex parte Young* doctrine as applied in the tribal context. Under the majority opinion, California may have been able to obtain the same relief simply by changing the labels in the complaint. This result simply elevates form over substance. We are unaware of any decision holding that *Ex parte Young* focuses on form rather than substance. Indeed, as explained above, *Ex parte Young* and its progeny clearly focus on the relief sought, not on the styling of the complaint. Thus, the majority opinion, in looking to the form of the complaint rather than its substance, fundamentally misconceives *Ex parte Young* as applied to tribal officers.

To put it more simply, either California can sue tribal officers to restrain unlawful tribal conduct, or it cannot. If it can, the form of the complaint—in terms of whether the defendants are named as "officers" or "individuals"—is irrelevant. If it cannot, it cannot avoid the encumbrance simply by changing the form of the complaint.

The respondents are thus wrong in arguing that the majority opinion fails to reach the tribal immunity issue. Rather, the majority opinion, although purportedly deciding a narrow question concerning the appealability of dismissal orders, is predicated on an anomalous, unprecedented view of the *Ex parte Young* doctrine as applied to tribal officers. Thus, the respondents' entire argument—that California should have followed *Ex parte Young* by

amending its complaint—begs the very question raised in the petition. In California's judgment, it *has* followed *Ex parte Young*. Thus, the issue here is the proper interpretation and application of *Ex parte Young* in the tribal context. The majority opinion necessarily resolved this issue in holding that the dismissal order was nonappealable. Its decision, in our view, is fundamentally wrong. In any event, this Court should grant the petition to review the question.

II

IF THE RESPONDENTS' INTERPRETATION OF EX PARTE YOUNG IS CORRECT, CALIFORNIA CANNOT AUTOMATICALLY SUBSTITUTE SUCCESSOR TRIBAL OFFICERS IN ITS COMPLAINT

As explained in the petition, a main reason that California brought its action against the tribal officers in their "official" capacity is to ensure that the judgment binds the office, and not the individual who temporarily occupies it. Pet. 18-19. The respondents argue that the automatic substitution rule, contained in Federal Rule of Civil Procedure 25(d)(1), provides for automatic substitution of successor tribal officers. Res. Br. 18. This rule, which was not quoted by the respondents, provides:

> "When a public officer is a party to an action *in his official capacity* and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party." (Emphasis added.)

The automatic substitution rule thus applies only to actions against an officer "in his official capacity." If, as California argues, the capacity of the tribal officer is determined by the nature of relief sought rather than the styling of the complaint, then the automatic substitution rule would apply in *any* action against a sovereign officer

to restrain unlawful conduct. If, however, the respondents and majority opinion are correct in the view that the officer's capacity is determined by the styling of the complaint, the automatic substitution rule would apparently not apply if, as the majority opinion insists, California amends its complaint to name the defendants in their "individual" capacity. Under these circumstances, the action would *not* be against the defendants in their "official" capacity, and thus would not fall under the automatic substitution rule. In short, if the respondents and majority opinion are correct in their analysis of *Ex parte Young*, the automatic substitution rule would apparently not apply if California amends its complaint, and the judgment would not apply to successor tribal officers.

III

CALIFORNIA COULD NOT HAVE AMENDED ITS COMPLAINT, AND THUS THE DISMISSAL ORDER WAS APPEALABLE EVEN UNDER THE NINTH CIRCUIT'S RESTRICTIVE INTERPRETATION OF THE FINALITY RULE

The respondents argue that California should have amended its complaint prior to appealing the dismissal order, and that its failure to do so renders the dismissal order nonappealable. Res. Br. 7-10. As explained above, California could not have possibly saved its complaint by amendment, assuming a proper interpretation of *Ex parte Young*. Under this result, the dismissal order was final and appealable even under the Ninth Circuit's more restrictive interpretation of the finality rule. Therefore, although we believe that the Ninth Circuit's interpretation of the finality rule is wrong and should be reviewed by this Court, Pet. 21-23, the result should be the same regardless of the proper interpretation of the rule.

The respondents' argument that the district court extended an "invitation" to California to amend its com-

plaint, Res. Br. 3, and that California "stubbornly" declined the invitation, *id.* at 21, marks a revisionist approach to the actual proceedings in the district court. As noted earlier, the district court held that California could not obtain the relief which was sought in the complaint. See note 3, *supra,* and accompanying text. Indeed, the respondents forcefully argued in support of their dismissal motion that the tribal immunity doctrine extends both to the Tribe and to tribal officers, and thus that California cannot obtain relief against the officers that would affect the Tribe itself.[4] They repeated this argument in the Court of Appeals, asserting that the *Larson* doctrine does not apply to Indian tribes or officials and that actions can-

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[4]The respondents' brief in support of the dismissal motion stated:

"The present action seeks precisely the same relief sought in *People of the State of California v. Quechan Tribe of Indians,* 595 F.2d 1153 (9th Cir., 1979). In that action plaintiff also sought declaratory relief against the Quechan Tribe of Indians regarding the right to enforce its Fish and Game laws within the Fort Yuma Reservation. The Court concluded that the Tribe's sovereign immunity barred California's suit.

"In the instant action, plaintiff is apparently attempting to relitigate the identical issues by use of the transparent device of naming the officers of the Quechan Tribe (i.e. the Tribal Chairman, Council, and Game Warden), and suing them in their capacity as such.

"However, *sovereign imunity extends not only to the Tribe itself, but also to its officers, its agents, and its employees.* Accordingly, the Tribal Chairman, Council Members, and Game Warden, all fall within such protection.

"Thus, it is neither necessary nor permissible for the Court to reach the merits of plaintiff's claims, because all such claims against all the named defendants are barred by tribal sovereign immunity from unconsented suit.

"For these reasons, the Court should *dismiss the present action* for lack of personal and/or subject matter jurisdiction and quash service of summons on the named defendants." Def. Mem. of Points and Authorities, at 2 (emphasis added).

not be maintained against tribes or officials in the absence of express congressional authorization. Pet. 15 n. 8.

It is thus clear that, both under a proper interpretation of *Ex parte Young* and as a result of the actual proceedings in the district court, California could not have saved its complaint by amendment. The respondents, in now suggesting otherwise, are attempting to rationalize the lower decisions. Their disingenuous comment that California "shot itself in the foot" by not amending the complaint, Res. Br. 25, distorts what actually occurred at the district court level. In attempting to rationalize the lower decisions, the respondents now assert a different view of the tribal immunity doctrine than they asserted below; they argued below that the *Ex parte Young* doctrine does not apply to tribal officials, see note 4, *supra;* Pet. 15 n. 8, and they now argue that, although the doctrine may apply to tribal officials, it does not apply here because of the form of the complaint. We do not suggest, of course, that the Court should grant the petition simply because the respondents have changed their position. Rather, in attempting to rationalize the lower decisions, the respondents now provide an interpretation of *Ex parte Young* that is fundamentally wrong. As explained above, their present interpretation means that the doctrine focuses on the form rather than the substance of the complaint, which in turn means that any judgment apparently does not apply to successor tribal officers.

IV

THE RESPONDENTS' BRIEF CONTAINS SEVERAL MISCHARACTERIZATIONS OF THE ISSUES IN THE CASE

Finally, the respondents' brief contains several inexcusable mischaracterizations of the issues raised here. First, the respondents mischaracterize the constitutional issue by asserting that California first disclaimed, and then later

adopted, the argument that the defendants' action is unconstitutional. Res. Br. 14-16. As Judge Norris correctly observed in his dissenting opinion, California "seeks a declaration that the tribal ordinance . . . is in conflict with federal law, including federal statutes," and "if its theory is correct, the ordinance may offend the Supremacy Clause" . . . ." Pet. App. 13. In other words, the tribal ordinance is inconsistent with federal statutory law and federal common law, and, *for that reason*, is invalid under the Supremacy Clause. The constitutional issue arises under the Supremacy Clause, not under other constitutional provisions imposing substantive standards of conduct. Our position on this issue has been clearly and consistently expressed throughout this litigation.

Also, the respondents mischaracterize the present nature of the controversy by asserting that it has been "vitiated" by subsequent events. Res. Br. 11-14. In fact, the tribal ordinance is still in effect, and is still being enforced. Moreover, this Court's recent decision relating to tribal control of on-reservation fishing by non-Indians, see *New Mexico v. Mescalero Apache Tribe,* ..... U.S. ....., 51 U.S.L.W. 4741 (1983), is not applicable here for reasons spelled out in the states' amici brief in support of the petition. See Amici Curiae Brief of States of Arizona *et al.* in Support of Petition for Writ of Certiorari, 15-16 n. 1. Moreover, the amici states have noted that they are involved in several other controversies that involve the tribal immunity issue. *Id.* at 1-4. Thus, both the legal issues and factual dispute herein are fully alive and justiciable.

Further, the respondents mischaracterize California's interests by asserting that California is more interested in pursuing a test case than obtaining resolution of the underlying dispute. Res. Br. 5, 25 n. 6. In fact, the tribal immunity issue was raised by the respondents, not by California. Indeed, California has been attempting to reach the merits of the underlying dispute for more than seven years, and

has been unable to do so because of the respondents' heretofore-successful assertion of the tribal immunity defense. Although the respondents are not to be begrudged for asserting any defenses available to them, they are hardly in a position to argue—after having raised a defense that was sustained by the lower courts—to assert that California, in attempting to overturn the lower decisions, is more interested in obtaining a decision on the defenses than on the merits.[5]

Finally, the respondents mischaracterize California's argument by asserting that California is concededly suing "the Tribe itself," supporting the assertion by quoting part of our lower brief out of context. Res. Br. 2, 6. In the *unquoted* part of our brief, we said that the action should be considered against the Tribe only in the sense that "the *effect* of our action would restrain the Tribe from acting to prevent California fish and game officials from entering the reservation to enforce California laws against non-Indians. . . ." Cal. Br. 11 (emphasis added). We thus stated only that our action, by restraining tribal officials acting on behalf of the Tribe, would in effect restrain the Tribe itself. Our understanding of the tribal immunity doctrine is that such actions are sustainable. If the respondents are

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[5]The respondents also mischaracterize the letter from the Director of the Department of Fish and Game, set forth in an appendix to the brief in opposition. Res. Br. 9. The respondents cite this letter for the proposition that California's objective in the lawsuit is to obtain resolution of the tribal immunity issue, not the merits of the case itself. *Id.* In fact, the letter indicates only that California filed a motion to expedite the appeal (which was subsequently denied) in order to "expedite" the resolution of the tribal immunity issue. Res. App. 1. Nothing in the letter suggests that California is principally interested in the tribal immunity issue, as opposed to the merits of the controversy itself. Indeed, the letter indicates just the opposite, for it makes clear that California has continued to be eager and willing to settle the case.

suggesting otherwise, they are in effect arguing that no remedy is available to restrain unlawful tribal conduct. As noted earlier, this was the same argument made by the respondents in the case below. See note 4, *supra;* Pet. 15 n. 8.

CONCLUSION

The respondents argue that "any alteration to the tribal immunity doctrine should . . . come from Congress, not the judiciary." Res. Br. 38. To the contrary, the tribal immunity doctrine is a common law doctrine, not a statutory one. It was adopted and developed by the courts, not Congress. Therefore, clarity should come from the courts. The confusion surrounding the doctrine is evident from the semantical obfuscations appearing in the lower decisions. The time has come to clarify the doctrine, and this case presents an appropriate vehicle for doing so.

Respectfully submitted,

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No. 82-1915

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

STATE OF CALIFORNIA,
Petitioner,

VS.

VINCENT HARVIER, as Chairman of the Quechan Tribal Council, *et al.*,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

AMICI CURIAE BRIEF OF STATES OF ARIZONA, FLORIDA, IDAHO, NEVADA, NORTH DAKOTA, OKLAHOMA, SOUTH DAKOTA, UTAH, WISCONSIN AND WYOMING IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST

1. General Interest of States

The amici states are frequently embroiled in controversies with the Indian tribes who reside within their borders. Disputes between Indian tribes and the amici states primarily concern hunting and fishing rights, water rights, natural resource development, state authority to tax and regulation of gaming. Many times, Indian tribes have questioned state authority to regulate the activities of non-Indians on reservations just as the Quechan Indian Tribe has in this case.

In most lawsuits involving these issues, the Indian tribe has sued the state. However, in some instances, the state has sought judicial resolution of a particularly volatile controversy. In the latter situation, states have been forced to use their imagination to circumvent the tribal immunity doctrine in so far as it bars actions against Indian tribes. In some cases, the federal government has been named in lieu of the Indian tribe. For the most part, the efforts of amici states to obtain judicial resolution of disputes involving Indian tribes have been thwarted by the tribal sovereign immunity doctrine which deprives states of a proper forum in federal court.

2. Specific Interest of Individual States

The State of South Dakota is currently involved in litigation with the Lower Brule Sioux Tribe of South Dakota, concerning jurisdiction over hunting and fishing by all persons on the reservation, and within those areas acquired by the United States for the Fort Randall and Big Bend Dam and Reservoir projects. These areas were taken by the United States pursuant to the Flood Control Act of 1944. The United States District Court for the Central Division of the District of South Dakota, by order of April 30, 1982, decided that the State had exclusive jurisdiction to regulate hunting and fishing within the taking area, and reserved the question as to jurisdiction to regulate on the reservation. *Lower Brule Sioux Tribe v. State of South Dakota, et al.*, Civ. 80-3046, D.S.D. filed April 30, 1982. The appeal of the decision is currently pending before the Court of Appeals for the Eighth Circuit. Similar problems will obviously arise on other South Dakota reservations. The tribal sovereign immunity doctrine impedes a judicial resolution of those problems, and others, including jurisdiction to tax non-Indians, regulation of state granted water rights, and control of non-Indian gambling on the reservation.

The State of Florida is presently attempting to require non-Indians engaging in certain construction activities on Indian Reservations to comply with state environmental protection laws. Florida's Indian Reservations are generally located on environmentally sensitive wetland areas. Florida has also unsuccessfully attempted to apply the state's gaming laws (bingo statute) to tribal gaming activities. See *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 1717.

The State of North Dakota has four Indian reservations within its geographic boundaries and has an Indian population in excess of twenty thousand people. North Dakota is presently faced with questions involving oil and gas taxation, municipal bonding, and Indian law jurisdictional questions which directly relate to tribal sovereign immunity.

The State of Nevada claims title to Pyramid Lake, a large navigable lake enclosed by the interior boundaries of an Indian reservation. In *Block v. United States*, 43 CCH S.Ct. Bull. P. B2353 (May 2, 1983), the United States Supreme Court held that actions by states to quiet title to lands wrongfully held by the United States must conform to the Quiet Title Act of 1952 (28 U.S.C. § 2409a). Now Nevada has been foreclosed by the Quiet Title Act's statute of limitation provisions from quieting title to the Lake. State jurisdiction over non-Indians has effectively been precluded by federal and tribal exclusion of State agents. If the State of Nevada, as California, is precluded from bringing suit against the tribal officials challenging unlawful tribal practices, the State simply has no judicial remedy.

The State of Wisconsin was faced with a claim of tribal sovereign immunity from suit in a case involving an attempt by the Lac Courte Oreilles Band of Lake Superior Chippewa Indians to regulate the hunting and fishing activities of nonmembers on navigable waters within reser-

vation boundaries. See *State of Wisconsin v. Baker*, 464 F.Supp. 1377 (W.D. Wis. 1978) (Dec. on motion to dismiss); 698 F.2d 1323 (7th Cir. 1983). The tribe has filed its petition for writ of certiorari with the Supreme Court (No. 82-1756). Although the tribe's sovereign immunity claim is no longer an issue in that case, Wisconsin expects that the issue will arise in future cases.

SUMMARY OF ARGUMENT

The majority opinion below holds that California cannot sue tribal officers in their "official" capacity to restrain them from carrying out an allegedly unlawful tribal ordinance, but holds that the district court dismissal order is nonappealable because it is not "clear" that California is unable to sue them in their "individual" capacity. However, it is reasonably clear that California has no adequate remedy against the tribal officers in their "individual" capacity, because California cannot logically sue them in that capacity for *official* acts in carrying out an allegedly unlawful tribal ordinance. Moreover, even if California *could* sue them in their "individual" capacity, any resulting judgment in California's favor would run against the individual defendants rather than the office that they occupy, thus affording California a hollow victory if the Tribe elects new tribal officers.

Therefore, the practical effect of the lower court decision is to prevent states and other litigants from obtaining effective relief against tribal officers to prevent them from carrying out unlawful tribal policies. In this sense, the lower decision places Indian tribes above the law, in that no remedy is available to restrain them from committing unlawful acts. The lower decision thus creates an anomaly in the sovereign immunity doctrine as applied to Indian tribes, since the doctrine does *not* bar actions to restrain unlawful conduct by officials of the federal government and the states.

Therefore, this Court should review this case to make clear that no such anomaly exists, and that tribal officials can be sued in their official capacities to restrain them from committing unlawful acts. Further, the Court should clarify the tribal immunity doctrine generally, and perhaps determine whether the doctrine has continued validity at this time.

Thus, the amici, having an interest in limitation of the tribal sovereign immunity doctrine, request that the Court grant California's petition for writ of certiorari.

ARGUMENT

INTRODUCTION

This case raises significant issues concerning the interrelationship of federal, state and tribal authority over activities on Indian reservations. The State of California has attempted, by two different lawsuits, to obtain a judicial declaration of its authority to regulate hunting and fishing activities of non-Indians on the Fort Yuma Reservation in California. Assuming that the doctrine of tribal sovereign immunity has validity, the Ninth Circuit properly held that California lacked authority to obtain a declaration in its first action, since the action was filed directly against the Tribe. In the second action, however, California did not sue the Tribe, but instead sued the tribal officers in their representative capacity for carrying out unlawful acts on behalf of the Tribe. California thus followed the customary practice in sovereign immunity cases of suing the sovereign official in his representative capacity for acting unlawfully on behalf of the sovereign. See *e.g., Andrus, Secretary of the Interior, et al. v. Allard, et al.,* 444 U.S. 51 (1979); *Andrus, Secretary of the Interior v. Idaho, et al.,* 445 U.S. 715 (1980); *Schweiker, Secretary of Health and Human Services v. Wilson, et al.,* 450 U.S. 221 (1981); *Harris, Secretary of Health and Human Services v. McRae, et al.,* 448 U.S. 297 (1980).

The district court and the majority of the Ninth Circuit held, however, that this customary practice has no validity in actions against tribal officers acting on behalf of the Tribe. In the district court's view, California cannot obtain relief against tribal officials that cannot be obtained directly against the Tribe. Pet. App. 22; Pet. 4 n. 3. The district court failed to appreciate that the sovereign immunity doctrine—as applied in actions to restrain sovereign officers from acting unlawfully on behalf of the sovereign—is somewhat fictitious, in that relief *can* be obtained against sovereign officers in circumstances where the relief cannot be obtained directly against the sovereign, as long as the relief is to restrain future illegal conduct. See, *e.g.*, Tribe, *American Constitutional Law* 133 (1978); *Ex parte Young*, 209 U.S. 123, 159, 160 (1908). Thus, the district court misapplied the sovereign immunity doctrine in the tribal context.

The majority opinion of the Ninth Circuit also misapplied the sovereign immunity doctrine in the tribal context, although for slightly different reasons. The majority opinion held, as did the district court, that actions cannot be maintained against tribal officers in their "official" capacity to restrain them from carrying out unlawful acts on the behalf of the Tribe. However, the majority opinion went beyond the district court decision in holding that it is not "clear" that California could not amend its complaint to sue the tribal officers in their "individual" capacity. Thus, the Ninth Circuit determined that the dismissal order was nonappealable. As the amici states now explain, both conclusions are wrong, and the practical effect of the decision is to prevent states and other litigants from effectively restraining Indian tribes from engaging in an unlawful course of conduct. The decision thus raises an important issue of federal law that should be reviewed by this Court.

I

IN ATTEMPTING TO RESTRAIN TRIBAL OFFICERS FROM PURSUING UNLAWFUL TRIBAL POLICIES, STATES AND OTHER LITIGANTS LACK AN ADEQUATE REMEDY AGAINST THE TRIBAL OFFICERS IN THEIR "INDIVIDUAL" CAPACITIES

It is reasonably clear that states and other litigants, in attempting to prevent tribal officers from carrying out allegedly unlawful tribal policies, have no adequate remedy against the tribal officers in their "individual" capacities, and the majority opinion erred in suggesting otherwise. Any such remedy is inadequate for three distinct reasons. First, states and other litigants cannot logically sue tribal officers in their "individual" capacity for *official* acts undertaken on behalf of the tribe, where such acts are within the scope of their authority under tribal law. That is, actions against tribal officers in their "individual" capacity can logically be maintained only where they act *ultra vires* their authority under tribal law, not where the tribal law is itself in potential violation of federal law. As the dissenting opinion below properly states:

> "[W]here the majority errs, and where I disagree, is in its suggestion that suing the tribal officials for acting *ultra vires* is the *only* way to invoke the doctrine of that case [*Ex parte Young*]. There are two theories that invoke the doctrine of *Ex parte Young*. [Citation omitted.] One, certainly, is that government officials acted beyond the scope of their statutory authority. [Citations omitted.] This theory the majority recognizes. The other theory consists of an allegation that the government officers, though not acting *ultra vires*, were 'carrying out official duties in violation of the Constitution.' [Citations omitted.] It is this theory the majority completely ignores and on which California rests its complaint." Pet. App. 9-10 (emphasis in the original).

California's complaint in this case is that the tribal officers are violating federal law by carrying out an unlawful tribal ordinance, not that they are acting *ultra vires* their authority under tribal law. By holding that California must amend its complaint to allege the latter cause of action, the majority opinion holds that California should assert a cause of action for which there is no remedy.

Second, even if a plaintiff *could* obtain relief against tribal officers in their "individual" capacity where they act on behalf of a tribe, such relief would not be particularly helpful or useful to the plaintiff's cause. Any judgment against tribal officers in their "individual" capacity necessarily runs against them as individuals, and not against the office that they occupy. Therefore, the tribe could easily defeat any adverse judgment simply by electing or appointing new tribal officers. To ensure that the judgment runs against the office rather than the individual, a plaintiff must properly bring its action against the tribal officers in their "official" capacity. Thus, even assuming that California could "save" its complaint by naming the tribal officers in their "individual" capacities, any judgment favorable to California would be inadequate to protect the interests for which it brought its lawsuit.

Third, if a plaintiff cannot sue tribal officers in their "official" capacity, the purposes of the sovereign immunity doctrine are not served by the majority opinion's holding that a plaintiff *may* be able to sue them in their "individual" capacity. This holding appears to suggest that the validity of pleadings, at least in the tribal immunity context, are measured by the styling of the complaint, not by the substantive conduct which gives rise to the complaint. This result simply elevates form over substance. Such a result creates an anomaly in the sovereign immunity doctrine as applied in the tribal context. In other sovereign immunity cases, this Court has reached the merits of the

cases brought against sovereign officials without even considering whether the action was maintained in their "official" or "individual" capacity. See, *e.g., Andrus, Secretary of the Interior v. Allard, et al.*, 444 U.S. 51 (1979); *Andrus, Secretary of the Interior v. Idaho, et al.*, 445 U.S. 715 (1980). The majority opinion below appears to suggest a different result under the tribal immunity doctrine. It would seem either that actions *can* be maintained against tribal officers to restrain "official" acts, or that such actions *cannot* be maintained. If such actions *can* be maintained, the majority opinion was wrong in holding otherwise. If such actions *cannot* be maintained, it would seem that the result cannot be changed by simply changing the styling of the complaint.

II

THE MAJORITY OPINION BELOW, IN PRACTICAL EFFECT, BARS LITIGANTS FROM RESTRAINING TRIBAL OFFICERS WHO, ON BEHALF OF THE TRIBE, CARRY OUT A TRIBAL POLICY IN VIOLATION OF FEDERAL LAW

In holding that California should have presented to the district court the question whether California has a remedy against the tribal officers in their "individual" capacity, the majority erred for any such remedy is inadequate to protect the interests for which California brought its lawsuit. The practical effect of the lower decision is thus to prevent California and other litigants from challenging the validity of a tribal ordinance that, under California's view, violates federal law.

The majority opinion thus appears to hold that the tribal immunity doctrine is governed by different rules than those that generally apply to the sovereign immunity doctrine in other contexts. This Court has squarely held that the state sovereign immunity doctrine, as expressed in the

Eleventh Amendment of the U.S. Constitution, does not shield the states from actions to restrain violations of federal law. See, *e.g., Ex parte Young*, 209 U.S. 123 (1908); *Edelman v. Jordan*, 415 U.S. 651 (1974). Similarly, this Court has held that the sovereign immunity doctrine does not shield federal officials from actions to restrain such violations. See, *e.g., Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949); *Dugan v. Rank*, 372 U.S. 609, 621-622 (1963). It would therefore be anomalous to shield tribal officials from such actions by invocation of the sovereign immunity doctrine. This Court has never suggested the existence of such an anomaly. To the contrary, in dictum in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978), this Court stated that, "*as an officer of the Pueblo [Tribe]*, petitioner . . . is not protected by the tribe's immunity from suit," thus suggesting that tribal officers *can* be sued for carrying out unlawful acts on behalf of the tribe. (Emphasis added.)

This result is also supported by sound public policy. If neither tribes nor tribal officers can be sued when the tribe carries out an unlawful policy, then Indian tribes are apparently above the law in that no remedy exists to correct unlawful tribal action. Certainly Indian tribes have no legitimate interest in carrying out policies in violation of federal law. As the dissenting judge in the case below properly stated:

> "I am not persuaded that subjecting Indian tribes to federal court actions for prospective relief under *Ex Parte Young* will unduly interfere with the sovereign powers of Indian tribes. Nor am I persuaded that tribal officers may, without a grant of authority from Congress, interfere with the enforcement of valid state laws, and then claim that the Tribe's sovereign immunity bars the state from suing for injunctive relief in federal court. Just as the sovereignty of a tribe must

> fall before the will of Congress, so too a tribe's immunity must yield when the state brings suit to enforce prospectively the will of Congress." Pet.App. 17.

Indeed, the conduct of the tribal officials in this case, carrying out an allegedly unlawful tribal ordinance, is potentially in violation of the U. S. Constitution. California seeks a declaration that the tribal ordinance is in violation both of federal statutes and the federal common law describing the limited applicability of state laws on Indian reservations. If the tribal ordinance is invalid either under federal statutory or common law, it is invalid under the Supremacy Clause, which provides that federal law "shall be the supreme law of the land." U.S. Const., Art. VI, § 2. As the dissenting judge properly stated:

> "If its [California's] theory of law is correct the ordinance may offend the Supremacy Clause and actions taken under color of that ordinance would thus be carried out in violation of the Constitution." Pet.App. 13.

The majority opinion, in suggesting a distinction between "official" and "individual" acts of tribal officers, has apparently followed the distinction of other federal courts in cases where the plaintiff seeks the recovery of tribal assets, rather than attempts to restrain the Tribe from engaging in an unlawful course of conduct. Other federal courts have held, in actions to recover tribal assets, that actions can only be maintained against tribal officers in their "individual" rather than "official" capacity because the plaintiff would otherwise be able to obtain tribal assets that could not be recovered in an action against the tribe itself. See, *e.g., Bottomly v. Passamaquoddy Tribe,* 599 F.2d 1061, 1064 (1st Cir. 1979). In other words, the distinction between "official" and "individual" conduct may be appropriate in cases involving retrospective rather than prospec-

tive relief, where—assuming the validity of the tribal immunity doctrine—relief *cannot* be obtained against tribal officers that would indirectly operate against the tribe. The distinction is clearly inappropriate in cases, as here, where the relief *can* be obtained indirectly against the tribe, in the sense that tribal officers can be restrained from carrying out unlawful acts on behalf of the tribe. This Court has clearly held that the sovereign immunity doctrine, as applied to the federal government and the states, prohibits actions for retrospective but not prospective relief. See *Ex parte Young*, 209 U.S. 123 (1908); *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949). By applying the distinction between "official" and "individual" acts in this case, the majority opinion creates an anomaly in the sovereign immunity doctrine as applied in the tribal context.

III

THIS COURT SHOULD REVIEW THIS CASE TO CLARIFY THE TRIBAL IMMUNITY DOCTRINE, AND PERHAPS TO DETERMINE WHETHER THE DOCTRINE HAS CONTINUED VALIDITY

In the view of the amici states, additional reasons exist that justify review of the lower decision. First, the doctrine of sovereign immunity, which has caused considerable confusion in its usual context, apparently causes even greater confusion in the tribal context. California, in its second lawsuit, followed the customary and appropriate practice by naming the tribal officers in their capacity as tribal representatives. Indeed, if California had not sued them in that capacity, it would have run the risk that the Tribe could effectively negate any adverse judgment by simply electing or appointing new tribal officers. California, although following the customary practice, now finds that its action has again been dismissed on sovereign immunity grounds, owing to the confusion and ambiguities that surround this entire doctrine. The Ninth Circuit decision

makes unclear the circumstances in which the tribal immunity doctrine applies, or whether the doctrine prohibits actions to restrain unlawful courses of conduct. This Court should grant the petition to clarify the circumstances in which the doctrine applies. Until these circumstances are clarified, the amici states will not know how to proceed in cases where their respective interests are in conflict with tribal interests. Since the tribal immunity doctrine derives from the federal common law rather than constitutional or statutory enactments, this Court—which originally developed the doctrine—now has a special obligation to clarify it.

Further, the Court should undertake to determine whether the tribal immunity doctrine retains validity at this time. The doctrine originated in an earlier age, when Indian tribes were largely thought to be sovereign entities that were wholly immune from the application and effect of state laws. See *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940). In the modern age, however, this Court has attempted to reach an accommodation between federal, state and tribal interests as applied to on-reservation activities, and this accommodation supports the limited application of state laws on Indian reservations. See, *e.g., Organized Village of Kake v. Egan,* 369 U.S. 60, 72, 75 (1962); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142 (1980). Accordingly, Indian tribes are no longer recognized as having the attributes of sovereignty as in former times. Indeed, this Court has commented that tribal immunity from state laws now depends primarily on Congress' preemptive authority over Indian tribes and reservations, not on the inherent sovereignty of the tribes themselves. *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 172 (1973). In light of this new adjustment in the relations of tribes and states, it may be that the sovereign immunity doctrine, as applied to Indian tribes, is an anachronism.

IV

THE CASE IS RIPE FOR REVIEW

The amici states agree with California that the case is ripe for review at this time. Although the majority opinion dismisses the appeal for lack of jurisdiction, the dismissal is predicated on the assumption that California should amend its complaint to sue the tribal officers in their "individual" capacity. As explained above, California lacks an adequate remedy to sue the tribal officers in this capacity, since (1) it cannot logically sue them in their "individual" capacity for *official* acts committed within the scope of their tribal authority, and (2) even if California *could* obtain "individual " relief against the defendants, the relief would run against the defendants as individuals rather than the office that they occupy. Thus, the majority opinion, in practical effect, deprives California of the sole remedy by which California can obtain relief that will effectively bind tribal representatives who carry out an unlawful tribal ordinance.

V

THE APPEALABILITY ISSUE INVOLVES AN IMPORTANT FEDERAL ISSUE THAT SHOULD BE REVIEWED BY THIS COURT

Finally, this case presents a significant question whether orders dismissing complaints are "final decisions" within the meaning of 28 U.S.C. § 1291. Although most circuit courts of appeal take the position that such orders are final and appealable, the Ninth Circuit takes the position that such orders are final and appealable only if it is "clear" that the complaint could not be "saved" by amendment. Moore, *Federal Practice* (hereafter "Moore") ¶ 110.13(1) (2d ed. 1982).

The purpose of the finality rule is to prevent multiple appeals in the same proceeding. See *Catlin v. United*

States, 324 U.S. 229, 233-234 (1945). There is little danger that multiple appeals will occur in this case, since, as stated above, California's only practical remedy is against the tribal officers in their "official" capacity and the majority opinion below bars California from asserting this remedy.

In the view of the amici states, the finality rule should be liberally construed where, as here, an order dismissing a complaint effectively precludes the plaintiff from asserting the only remedy that will serve the interests for which the lawsuit was brought. This result would seem particularly compelling where, as here, an earlier appellate panel has already ruled on the appealability issue in favor of the appellant. See Pet. 5. Professor Moore has stated that the finality rule "should be interpreted to prevent the loss of the right of an appeal, not to facilitate loss." Moore, ¶ 110.18(3). In this case, the Ninth Circuit appears to have taken the opposite approach, invoking the finality rule to unfairly prevent California from reaching the merits of the tribal immunity issue, even though this issue must be decided before California can reach the merits of its complaint. Since California's only effective remedy is against the tribal officers in their "official" capacity, and since the district court held that California cannot assert this remedy, the dismissal order was clearly final and appealable under 28 U.S.C. § 1291.[1]

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[1]Although the merits of California's complaint are not raised in this proceeding, it should be noted that this Court has held that the states have jurisdiction over on-reservation activities of non-tribal members where legitimate state interests are involved, and where Congress has not preempted state laws. See *Washington v. Confederated Tribes,* 447 U.S. 134 (1980); *Moe v. Salish & Kootenai Tribes,* 425 U.S. 463 (1976). In *New Mexico v. Mescalero Apache Tribe,* ... U.S. ..., 43 CCH S.Ct.Bull.P. B3251 (June 13, 1983), this Court recently held that New Mexico does not have concurrent jurisdiction over fishing and hunting by nonmembers on the reservation. The latter decision noted:

> "While under some circumstances a State may exercise concurrent jurisdiction over non-Indians acting on tribal reservations, [citations omitted] such authority may be asserted only if not preempted by the operation of federal law. [Citations omitted.] . . . [T]he determination does not depend on mechanical or absolute conceptions of state or tribal sovereignty, but calls for a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Id.* at B3260.

In undertaking the "particularized inquiry" in *New Mexico*, the Court emphasized that (1) the regulatory program in that case was a joint federal-tribal program, in that the tribal program was approved by the Secretary of the Interior, was based on recommendations provided by the Secretary, and was closely supervised by the Secretary, *id.* at B3254-B3255, B3266, and (2) the State was unable to "identify any regulatory function or service . . . that would justify" the exercise of concurrent state jurisdiction, and the State "cannot point to any off-reservation effects that warrant State intervention." *Id.* at B3269.

The amici states understand that California's complaint is predicated on the position that (1) the Quechan Tribe's regulatory program is not a joint federal-tribal program in any sense, and (2) California has a legitimate interest in asserting concurrent jurisdiction over on-reservation hunting and fishing by nonmembers of the Tribe. In fact, California argued strenuously in the first case against the Tribe that the tribal ordinance is inconsistent with a regulatory program established by the U. S. Fish and Wildlife Service under 50 CFR §§ 20.101-20.105. California further argued that federal law specifically authorizes states to adopt laws for the protection of certain wildlife species that are more stringent than federal laws, 16 U.S.C. § 708, and California asserted that this provision applies to nonmembers on Indian reservations. Also, California argued that the fish and game species in the case were migratory, and thus that the tribal ordinance has an effect on off-reservation resources. If the evidence supports California's various arguments, the present case would be distinguishable from New Mexico.

CONCLUSION

In the view of the amici states, this Court should grant the petition for writ of certiorari herein.

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